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THE
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ON

Pleas of the Crown,

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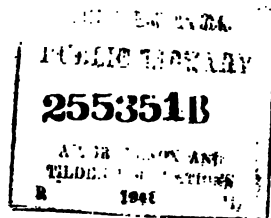
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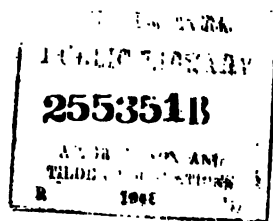
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LEONARD MAC NALLY.

*Dublin, Harecourt-Street,
August 4, 1802.*

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☞ THE strictest attention has been paid to preserve the language of the lawyers and judges, whose arguments and decisions are reported in this work : but there are many literal errors, which a laborious and sedulous attention to professional business in the courts, and an absence on circuit must excuse. However, with all its imperfections, it is hoped, that the work will be found useful, from the information it contains, particularly at the assizes, where the practitioner has neither time nor opportunity to make researches into the numerous and voluminous reports of trials and cases, from which the rules and illustrations herein formed and arranged, have been extracted.

CASES CITED.

A.		Brown	320
Abrahams v. Bunn, 1, 16, 37, 60,		Brecknock	322, 324
108, 115, 129, 130, 138, 146		Bond	5, 324, 381
Anncley v. Earl of Anglesea, 14,		Byrne	324, 381
181, 240, 257		Brocas v. mayor of London	357
Anstruther's case		Bishops, the seven	397
Alfop v. Bowkele		Broadhead v. Woodley	417
Atchenfon v. Everat 94, 97, 100		Boyle v. Boyle	443
Audley, lord 99, 161, 172, 192		Brady	471
Azir		Benyman v. Wife	487
Atwood		Brothwicke	539
Adams		Banfon v. Offley	541
Abington		Baylis	656
Anfell		C.	
Aickles 350, 477, 590		Chetwynd v. Wyndham	1
Aifton		College	10, 11
Albeny v. Wallace		Connor	35
Appletree		Carty and others	45
Almon		Colt v. Dutton	96
B.		Castele v. Bambridge	102
Bell		Carter v. Pearce	122, 130
Butcher		Crowder	146, 197
Bent v. Baker 89, 126, 128, 137		Cliviger parish	163
Beak v. Tyrrel		Crosby	195, 211, 232, 402
Bray		Clarke v. Shee and Johnsen	204
Broughton		Crosley	209
Bartlett v. Pickersgill		Casflemain	227, 228, 234
Blackman		Cuddenston v. Wilkins	234
Barlow v. Vowell		Crofts v. Bickering	242, 243
Bailey v. Wilson		Goddin v. Kendrick	245
Brazier		Church v. Perkins	265
Bartlett		Carr	321, 407
Broughton v. Harpur		Crawley	322, 577
Bentley v. Cook		Cornelius	347, 433
Bowes		Cornish	366, 376
Brodie		Cook	367
Bush v. Ralling		Crohagan	373
Burroughs v. Holcroft		Gallaghan	385
Berwick		Crew v. Saunders	485
Buckworth		Charnock	498
Benfon v. Olive		Clarke	503
		Coal-heavers	525
		Charlewood	592
		Coffet	593
		Cornwall	

Cornwall	604	Fox v. Lufthington	138
Clarke	646	Fotheringham v. Greenwood	140
Combe v. Pitt	654	For	145
		Fulwood	180
		Ford	209
D.		Friend	257, 367, 368, 376
		Francia	273, 404, 508
Dutton v. Colt	83	Finnerty	295
Dylone	61	Finny	324, 379
Dockery v. Dickenson	89	Fitzharris	369
Dodd	142, 201	Farmer v. Ather	433
Durham	146, 197	Farr	439
Donell	147	Furfinan v. Furfman	444
David v. Dinwoody	170	Fitzgerald	475
Davis v. Carter	211, 212	Fuller	649
Doc dim. Jupp. v. Andrews	244		
Dunn and Carty	259, 264	G.	
Dingler	174, 299, 385	Gahagan, and others	35
Damaree and Purchase	367, 376	Gordon, lord George	61
Drummond	387	Gardner	103
De Lamotte	408	Green	104
Dennison v. Wilmot	471	Goodtitle and Fowler v. Welford	117, 130, 136
Durore	501	Gordon	147, 356, 364, 373, 375
Deacon	505	Griggs	161, 181
Drake	512	Ganfell	211
Donnelly	598	Gricppe	235
		Gregg	273
E.		Gray	328
Essex, earl of	40, 294	Gwyn	359
East-India Company v. Goffing	112	Gardell	434
Ellis	112	Gordon, Thos. and Win.	488
Evans v. Gold	114	Gore	555
Eden	116	Grey	557
Edwards	258	Gribbe	600
Erifwell	300	Gibbons	682
East-India company	356		
Entic v. Carrington	644	H.	
		Hardy	7, 362, 611
F.		Hall	40, 51
Finny	4	Hinxman	50
Fitzharris	12	Hampden	59
Fenwick's, fir John, cafe	17, 29, 316, 390	Hopkin v. Neal	60
Fisher	50	Holcroft	221
Fagan	51	Hill	228
Frazer	56	Harris	320
Fitzpatrick	97	Hart	324, 516
French v. Backhouse	126	Haftings	325
French v. Foulston	126	Hoe v. Nelthorpe	355
		Hampden	361
		Huny	

CASES CITED.

vii

Huny	389	Langhorn	139
Hensley	407, 424, 503	Lovat	145
Hutchinson	428	Lomax v. Lomax	182
Hare	471	Love	191, 337
Hoet	479	Luckhurst	203
Hawkfwood	480	Lee v. Ganfell	211
Hussey v. Cook	519	Langhorn's cafe	291
Hodgson	538	Lowfield v. Stoneham	345
Harris and Minion	544	Le Merchant	350
Hull	558	Lynch v. Clarke	355
Holloway	565	Luttermal, Lucy, v. Reynell	378
Horner	591	Lee	481, 635
Hughes	603	Lewick	506
Harris	642	Lapier	593
Hart	650	Le Motte	602
Hall	650		

M.

J.		Maphan	35
Jackson	20, 25, 30, 258, 324, 416,	Muscot's cafe	37
	424	Magill	38
Jacobs	49	Mozey	48
James	163, 635	Mac Donald	49
Jordain v. Lashbroke	124, 198	Moise	105, 144
Jones v. Randall	357	Magarry	107
		Masters v. Drayton	114
		Mackartney	144
		Murphy	154, 231
		Meers v. lord Stourton	159
		M'Donald v. Ramfay	230
		Millar	263
		Montague	270
		Morley, lord	285, 307
		Mockler	320
		M'Cann	324
		Man v. Cary	356
		Minton	386
		Macpherson v. Thoytes	418
		Millescent v. Millescent	441
		M'Daniel	464
		Morris	470
		Motherfell	479
		Matthews	495
		Messenger	527
		Mawgridge	549, 565
		Mackally	552
		Murray	587
		Martin	593
		Munoz	641

L.

Low's, Christopher, cafe	23
Lumley's, lord, cafe	25
Lamb	38
Laver	39, 147, 400, 353, 506
Lockhart	48
Leary	61, 324, 379
Lopez v. Nuñez	72
Long	110
Low v. Joliff	135

N.

N.		Robcey v. Langston		67
		Ryan		95
Nunez	105, 106, 111	Robins v. Seyward		103
Newens	106	Redout v. Johnson	126, 131,	135
Newland	117	Rotheroe and others, v. Elton		137
Norfolk, duke of	156, 190	Rookwood's case	14, 140,	226,
Nicholson v. Dalyhanty	212			324
Netterville, lord	287, 214	Rudd	141, 176,	185
Nailor	563	Ruffell		142, 365
Nutt	642	Rhodes	142, 434,	476
Norton	653	Regicides		193
O.		Reilly		232
		Reading		256
Omychund v. Barker	64, 151, 156	Radbourne		289
Owens	102	Ravenstone		313
Oakhampton, mayor of	182	Roe, on dim. Haldane		346
O'Brien	253	Rosewell	365, 373,	376
Oates	256	Reason and Tranter	381,	566
Ogle	513	Revet v. Braham		418
Queby	547	Roache		428
P.		Richardson		450
		Ramfbottom		477
Peachum	7	Reculist		482
Paine	14, 39, 52	Radford v. M'Intosh		486
Pais	105, 111, 283	Royce		524
Parr	143	Rampton		558
Powell	151	Rowley		567
Preston, lord	160	Rock		594
Perry	181	S.		
Penshell v. Pendrell	182			
Price	195	Stafford's, lord	20, 27, 290,	
Philips v. Fowler	205		611	
Pendock v. Mackender	207	Stubbs	39, 193	
Palmer	218	Storie	40, 611	
Preston	403, 424, 503	Selfshire		49
Perry	441	Smith	110, 462	
Pitton v. Walter	479	Salmon v. Saxby		115
Penhalloe	494	Sutton v. Shelly		123
Page	494	Smith v. Prager		137
Plummer	537, 554	Sewell		144
Phillips	567	Searle v. Williams		221
Pears	590	Say and Seal		240
Patch	591	Shaftsbury, earl of		256
Parsons	632	Shears	324, 351,	416
Plympton	652	Sidney		395
R.		Stranger v. Searle		418
		Sanchar's case		466
Raifeigh, sir Walter	7, 40, 294	Shelly		487
Rols	56	Syr		497
		Saunders		

ix

Saunders	555	W.	
Stedman	565		
Sears	587	Windham v. Chetwynd	1, 16
Sharples and Greatrix	590	Warrickshall	47
Shee	641	Wheeler	51
Strahan	646	Wells and Williams	84, 143
Salmon	649	Whyte	96
Scott	657	Wyche	103
		Whiting	105, 106, 111, 142
		Watts	111
T.		Woolridge	120
Throgmorton's cafe	6, 25, 40	Walton v. Shelly	123, 131, 132, 133, 143
Turner	10	Walker v. Kearny	212
Thomas	25, 294	Warwick	24, 218, 229, 230
Thong	39, 193, 200, 268	Watkinson	240
Tremoult v. Dedire	89	Wilfon v. Raffell	250
Turner	101	Weldon	259
Traversa	152	Willis	270, 358
Tracy	162	Westbeer	283
Trew	195	Woodcock	296, 383
Taylor	261, 489	Welfa	315
Tanner v. Taylor	267	Weldon	324
Tooker v. duke of Bedford	307	Watfon	342
Thelwell	324	Warner v. Jones	358
Turner	335	Wright v. Littler	386
Trant	385	Withwell v. Dimisdale	484
Tandy	409	Winwiche	489
Townly	498	White	502
Turville v. Aynsworth	518	Woodward	ibid
Tomfon	561	Whitaker	516
Tooley	572	Wilde	517
Taylor, Sarah	685	Weston	524
		Wallis	540
		Wilfon	545
U. & V.		Wynne	587
Vaughan's cafe	35, 42, 507, 652	Wilkins	591
Vaillant v. Dodermead	246	Woodfall	649
Uddal	294	Williams	ibid
Vane	325, 295, 497, 503, 504		
Vincent	434, 452	Y.	
Varley	546	Young	41

THE
RULES OF EVIDENCE

ON

Pleas of the Crown.

BOOK I.

CHAPTER I.

Evidence by witnesses defined. The effect it should have on a jury when attended with impeachment of the witnesses or other circumstances which creates doubt in their minds, they being the constitutional and only judges of the facts given in evidence, and also of the credit due to the witnesses.

WITNESS, (*testis*) is one that gives evidence in a cause; an indifferent person to each party, sworn to speak the truth, the whole truth, and nothing but the truth: and if he will be a gainer or loser by the suit, he is then incompetent and cannot be sworn as a witness; for the term witness includes *competence*, though it does not include *credit*. 1 Lill. *Abid* 700 *Vide Windham, v. Chetwynd, post.* and *Abrahams, quitam v. Bunn. Post.* 3 Blackst. *Comm.* 369.

EVIDENCE, (*evidentia*) Parol evidence, in legal parlance, is used for proof, by testimony of a witness, or witnesses,

witnesses, examined on an oath or a solemn obligation, by an appeal to God administered to the witness, according to the custom and ceremonies of his religion. *Jacob. La. Dic. vide post. ca.*

There is also written evidence by records, writings, &c. *Vide post. ca.*

It is called *evidence*, because it demonstrates, makes clear, and ascertains to the jury, the truth of the very fact or point in issue to be tried, either on the one side or the other : and from this results—

Rule the First.

No evidence ought to be admitted to any point but that on which the issue is joined : for *probationes debent esse evidentes et perspicua.* Co. Litt. 283. Lill. Abr. 547. 3 Black. Comm. 367.

Rule the Second.

It may also at this day be considered a rule of law, that if a jury entertain a reasonable doubt upon the truth of the testimony of witnesses, given upon the issue, they are sworn well and truly to try, they are bound in conscience to deliver the prisoner from the charge found against him in the indictment, by giving a verdict of not guilty.

Sir EDWARD COKE, *in favorem vite*, exhorts juries not to give their verdict against a prisoner, without plain, direct, and manifest proof of his guilt, which implies, that where there is doubt, the consequence should be acquittal of the party on trial.

This reasonable doubt may result from various causes extrinsic of the evidence given upon oath ; for a witness may be perfectly competent and swear positively to a charge, material to the issue trying, and yet not deserve credit from the jury.

The infamy of his character, drawn from himself, upon a cross examination, or given in evidence against him by other witnesses ; his interest in the event of the prosecution ; an apparent influence on his mind ; and various

various other circumstances, may render him unworthy of credit, even on his oath.

So the credit of a witness may be materially affected, or totally destroyed by his manner of giving evidence. Resentment or partiality, when prevalent, are apt to shew themselves in the voice and countenance of a witness, and, when they do, they are circumstances which must impress suspicion upon the mind of a jury. So it often happens, that a witness destroys the credit of his testimony, by inconsistency, by prevarication, by the manner of his representing facts, and often by obtruding his own sentiments and opinions; sometimes by an excess of warmth, sometimes by a solicitous reserve, and often by—an affectation of candor. In all these, and similar cases, his credibility is, at least, questionable; and, unless his testimony be supported by clear and un-suspicious collateral proof of the facts charged on the prisoner by the indictment, *doubt* must arise in the minds of the jurors; and, by the humanity of the law, where doubt is created, an acquittal ought to be the consequence.

Therefore, wherever the evidence warrants the observation, the judges consider it an indispensable duty in charging the jury, to remind them, that as they are intrusted with the administration of public justice on the one hand, and with the life, the honour and the property of the prisoner on the other, their duty calls on them, before they pronounce a verdict of condemnation, to ask themselves whether they are satisfied, beyond the probability of doubt, that he is guilty of the charge alledged against him in the indictment.

And this shews, that evidence does not consist in merely the swearing to facts—but in the proof of facts, by witnesses of undoubted credit.

In the trials for high treason which took place in London in the year 1794, and those for the same offence in Dublin, in consequence of the rebellion of 1798, the rule above stated was fully adopted, not only by the court, but even by the counsel for the prosecution; and, in one case, was fully illustrated, on principles of law and of humanity. It was the case of

The KING, v. PATRICK FINNY, at a *Commission of Oyer and Terminer*, Dublin, January 1798, 38 Geo. III. high treason.

Mac Nally of counsel for the prisoner, urged, the consideration of the above rule to the jury, he argued the admission of immorality and of guilt, extracted from *James O'Brien*, the principal witness for the crown, by the cross examination of *Curran*, who was of counsel with him; if it had not totally destroyed his credit as a witness, it must, he said, have created in the breasts of the jury a *doubt*—a *doubt* which would authorise and sanction them to bring in a verdict of not guilty, for he could assert boldly, and without apprehending contradiction, that by the humanity of the law, *doubt* in the breast of a jury, was a certain assurance of acquittal to the prisoner—indeed, doubt and acquittal might be considered synonymous terms.

To the rule above laid down, the judges who presided at the trial also adverted in charging the jury—

CHAMBERLAIN, J. B. R. in his charge said—In support of this indictment *James O'Brien* has been produced, but before I state a tittle of his evidence I must give you this caution, namely, that if you should be of opinion that he has perjured himself, even to a collateral fact upon this trial, you are to reject his testimony, unless you find that it has been so corroborated by circumstances, or other unimpeachable evidence as to be irresistible.

You are to ask this question of yourselves—whether if he were indicted before you, for wilful and corrupt perjury, in answer to any question asked him this day, you would convict him? And if you are of opinion that you would convict him, you ought not, in my opinion, to convict the prisoner upon his unsupported testimony. And however strongly you may suspect the prisoner, yet it were better that one hundred guilty persons should escape, than make a precedent by which one innocent man might be found guilty upon such testimony!

The evidence of a witness who perjures himself wilfully, even as to a collateral fact, is to be regarded still less than that of an approver, who makes a candid and clear confession of every fact in the hearing of a jury;
such

such a recital may claim credit. But if a man, in any one instance upon a trial, shall commit wilful and corrupt perjury, I should be glad to know, whether it will not cast a DOUBT upon his evidence, as to the main fact which he has been brought to prove? And if there be a *doubt*, I take it to be a clear maxim, founded in humanity as well as law, that you must acquit the prisoner. For, in that case, the impression made on your minds, can at most create a strong suspicion of the prisoner's guilt—but that is not sufficient to convict him. *Ridgeway's Rep. of Finny's Tr.* 147.

SMITH, B.—You have been told that under an act of parliament frequently alluded to in the course of this trial, (*Stat. 25 Edw. 3.*) persons indicted of treason shall not be convicted except upon "*proveable evidence*" But though that act never had been made, you would draw the rule from your own hearts, and, you would say, you never would find a fellow creature guilty of an offence for which his life must be forfeited, except upon evidence full and complete in your minds, and such as ought to satisfy your consciences.

But the great question is, whether the evidence you have heard, can be considered as *proof* or not? Whether it be such as would justify you in finding the prisoner guilty? I not only think as Mr. Justice CHAMBERLAIN does, "that if you were sitting to determine whether the witnesses for the crown in the testimony they gave this day, were guilty of wilful and corrupt perjury or not; and that you should be of opinion that they were, you ought to acquit the prisoner at the bar;"—but I will go further, and say, if you have a DOUBT upon that question; if your minds be in a state of *oscillation*, you ought in that case to acquit the prisoner; because to justify a verdict of conviction to yourselves and to your country, the evidence upon which you decide should be above exception, and not evidence upon which you entertain any doubt. *Ibid.* 153. and MS.

So in the KING, v. OLIVER BOND, at a *Commission of Oyer and Terminer*, Dublin, July 1798.—CURRAN in his observation upon evidence spoke to the same point—(unfortunately this speech, which evinced the most resplendent

dent talents, is not reported in the trial, and is lost to posterity!)—but, as in the former case, CHAMBERLAIN, J. admitted the legality of the doctrine, by observing, “However trite it may be, I must remind you of the maxim founded in humanity—that if you have any RATIONAL DOUBT, then, as fair and honourable men, you must acquit.” *Ridgeway’s Rep. Bond’s Trial.* 251. And this maxim, as it is above rightly called, is now so established as scarcely ever to be omitted, even by the counsel for the crown, when stating cases to a jury.

CHAPTER II.

The antient practice of trial by witnesses; of a judicial oath generally; by whom such oath may be legally administered; and of the oath administered to witnesses in criminal cases in modern times.

IT was an antient rule of courts of law, that witnesses were not permitted to be examined on the part of a prisoner, on a prosecution at the suit of the crown. 1 *St. Tr.* 72. 173. 182.

As in Sir NICHOLAS THROGMORTON’s case, *Guildhall, London, April 1554, 1 Mar.* before BROMLEY, C. J. B. R. and other commissioners, on an indictment for high treason. The evidence for the crown being closed, the prisoner addressed himself particularly to the chief justice, and said, “What time it pleased the queen’s majesty to call you to this honourable office, I did learn of a great personage of her highnesses council, that amongst other good instructions, her majesty charged and enjoined you to minister the law in justice, indifferently without respect to persons. And notwithstanding the old error amongst you, which did not admit any witnesses to speak, or any other matter to be heard in favour of the adversary, her majesty being party, her highnesses pleasure was, that whoever could be brought in favour of the subject, should be admitted to be heard. And moreover, that

“you

“ you specially, and likewise all other justices, should
 “ not persuade themselves to sit in judgment, otherwise
 “ for her highness than for her subject. Therefore
 “ this manner of indifferent proceeding, being principally
 “ enjoined by God’s commandment, and the same
 “ being also commanded you by the queen’s mouth,
 “ methinks you ought of right to suffer me to have the
 “ statutes read openly, and also to *reject nothing* that
 “ could be spoken in my defence, and in thus doing you
 “ will shew yourselves worthy ministers, and fit for so
 “ worthy a mistress.”

This reasonable request of the prisoner, which reflects honour upon the queen, and disgrace upon the judges, was rejected; the CHIEF JUSTICE only making this extraordinary remark—“ You mistake the matter, the queen spoke these words to master *Morgan*, the chief justice of the Common Place,” and the jury were directed to determine the issue upon the *ex parte* evidence for the crown. 1 *St. Tr.* 72.

The conduct of the judge on the above trial, as on many others, that will necessarily be cited and adverted to in the course of this work, shews, that in former times, even in the tribunals of justice, law was borne down by factions. In those days, says *Erskine*, “ There were no judges as there are now, to hold firm the balance of justice amidst the storms of state; men could not then, as the prisoner can to day, look up for protection from magistrates independent of the crown, and awfully accountable in character to an enlightened world. As fast as arbitrary instructions were abolished by one statute, unprincipled judges began to build them up again, until they were beat down by another.” An observation true and melancholy indeed, and fully supported by the conduct not only of chief justice BROMLY, but of Sir *Edward Coke*, called the oracle of the law—and the philosophic lord *Bacon*, who has been stiled the greatest and the meanest of mankind. The inhumanity of the one in Sir *Walter Raleigh’s* case, and the mean subserviency of the other in *Peachum’s* case, fully justifies another observation of *Erskine* on *Hardy’s* trial; “ My
 “ respectable

“ respectable and learned friend, the Attorney-General
 “ (Sir *John Scott*) has not cited cases which have been
 “ the disgrace of this country in former times; nor
 “ asked you to sanction by your judgments, those bloody
 “ murders which are recorded by them as acts of Eng-
 “ lish justice.” *Hardy's Tr. vol. 3. 188. Fost. 199.*

Of the OATH.—Sir EDWARD COKE defines the word thus, Oath, he says, is a word derived of the Saxon word *eoth*, and is expressed by three several names, viz. first, *Sacramentum, a sacra, et sacramente*; because it ought to be performed with a religious *quia jurare, est Deum in testem vocare et est actus divini cultus.*

Secondly, *Juramentum a jure*, which signifieth law and right, because both are required and meant, or because it must be done with a just and rightful mind.

Thirdly, *Jus-jurandum*, compounded of two words, *a jure et jurando.*

In common law *sacramentum* is most commonly used—In our books and antient statutes, published in French *serement*, if the French word *serment* is used. 3 *Co. Inst.* 165. *Fleta li. 5. ca. 2. Brit. ca. 97. fo. 237. li. 8. fo. 19, 74, 134, 165, 236. Flet. li. 5. ca. 11.*

According to the above authority, it was resolved in the case of an under-sheriff, 26 *Eliz.* that an oath is an affirmation or denial by any *christian* of any thing lawful and honest, before one or more, that have authority to give the same, for advancement of truth and right, calling ALMIGHTY GOD to witness that his testimony is true. And it is two-fold, either *assertorium ut de præterito, sicut testes, &c. seu promissorium de futuro, sicut Judices, justiciarii officarii, &c.*

So as an oath is so sacred and so deeply concerneth the consciences of christian men, as the same cannot be ministered to any, unless the same be allowed by the common law, or some act of parliament; neither can any oath allowed by the common law, or by act of parliament, be altered but by act of parliament. 3 *Inst.* 165.

It is called a corporal oath, because the witness toucheth with his hand some part of the holy scripture. 3 *Inst.* 165.

There

[illegible]

It hath always been agreed, that the evidence of the king must in all civil cases be taken out in his own name, and that the evidence for the defendant, if it shall appear capital or not capital: or if an indictment of treason for a misdemeanor, or misdemeanor of treason, shall be upon oath: but in the case of the prisoner of war, the evidence was the evidence of the king, and the evidence of the king.

"SIR EDWARD COKE reported in terms of violence
 upon oath to the prisoner, and said: 'We have taken
 "in our hands, ancient authority, good will & reason
 "that in criminal cases the party bound or sure is
 "wholly bound to him, and therefore best & best
 "so much as a *comilla* will against it' - etc. &c.
 4 & Tr. 1-2

And then he states at another time that the very first time *Burlingame* introduced him to *Queen Victoria*, he said, "Madam, here is your Attorney-General," and "Domine Regine amicus." For months he

"have the record altered, for it should be *Attornatus* "*Generalis qui pro Domina veritate sequitur.*" And when the fault is denied, truth cannot appear without witnesses. 3 *Inst.* 79.

SIR MATTHEW HALE held the same opinion. His words are, regularly the evidence for the prisoner in cases capital is given without oath, though the reason thereof is not manifest; but, otherwise it is in all cases not capital, though it be misprision of treason. But in some special felonies by act of parliament, the prisoner's witnesses in cases capital shall be examined upon oath at his trial: namely, the statute against embezzling the queen's ordnance, by which it is provided, that "Any person impeached for such felony, should be received and admitted to make any lawful proof that he could by lawful men." *Stat. 31 Eliz. ca. 4.*

And the HOUSE OF COMMONS were so sensible of the absurdity of denying the prisoner witnesses upon oath, that in the bill for abolishing hostilities between England and Scotland, when felonies committed by Englishmen in Scotland, were ordered to be tried in one of the three northern counties, they insisted on a clause and carried it, against the efforts both of the crown and the house of lords, against the practice of the courts of England, and the express law of Scotland, "That in all such trials, for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the benefit of such credible witnesses to be examined upon oath for his clearing and justification." *Stat. 4. Jac. 1. c. 1.*

In the KING, *v.* COLLEGE, *Oxford*, 33 *Car. 2.* 1681, for high treason, before NORTH, C. J. JONES, RAYMOND and LEVINZ, J. One *William Serwin* being called as a witness for the prisoner, the chief justice said to him, "Look you here friend, you are not to be sworn; but when you speak in a court of justice, you must speak as in the presence of God, and only speak what is true." 3 *St. Tr.* 369.

So in the KING, *v.* TURNER, *Old Bailey*, January 1663, 15 *Car. 2.* Felony and Burglary. The prisoner

soner begged an order to bring in some witnesses, who from fear refused to come, unless summoned: but he was answered by the chief justice of the king's bench, lord HYDE, "We will help what the law will do; but this cannot be done. Those that will come in voluntarily may. The law will not allow us to summon any witnesses: you see, where they come against the king we cannot put them to their oaths, much less can we precept them to come." 2 *St. Tr.* 505.

Sir JOHN HAWLES, in his remarks on *College's* trial, above cited, considers the denying that witnesses should be examined upon oath, for a prisoner capitally charged, to be a hardship that gives colour to the imposing of other hardships. The denial of such evidence, he says, is not because the matter is capital, for then no witnesses ought to be examined upon oath for the appellee, in a capital matter. Neither is it because it is against the king, for then no witness ought to be examined upon oath for the defendant, in a trial upon an indictment for any criminal matter; yet in indictments of all criminal matters, not capital, it is permitted to the prisoner. 4 *St. Tr.* 178.

To say truth, never any reason was ever given for it, or can be if you believe my lord *Coke*, or my lord *Hale*, that that practice is not warranted by any act of parliament, book, case, or antient record, and that there is not so much as *scintilla juris* for it. For he says, when the fault is denied, truth cannot appear without witnesses. 3 *Inst.* 79. 2 *Hale, Pl. Cr.* 283. Both cited *ante* 9. 4 *St. Tr.* 178.

As for what is pretended, that it is swearing against the king, and therefore is not allowed of, it is a canting reason, which put into sensible English, a man will be ashamed to own. And as slight is the reason, that it being a matter of so high moment as a man's life, the prisoner will be the more violent and eager, and the witnesses may be more prevailed upon to swear falsely, more than they would be in a matter of less moment. None will deny but the end of trials in any matters capital, criminal or civil, is the discovery of truth: next, it is as necessary for the prisoner to have witnesses to prove his innocence, as it is for the king to have witnesses to

convict him of the crime; which proposition is agreed by the practice, it being always permitted that the prisoner shall produce what witnesses he can, but they are not to be on oath. 4 *St. Tr.* 178.

In the last place since truth cannot appear, but by the confession of the party, or testimony of witnesses of both sides, it is necessary to put all the engagement, as well of the witnesses of part of the prisoner, as of part of the king, to say the truth, the whole truth, and nothing but the truth, as the nature of the matter will bear: and as yet no better means has been found out than an *oath*, which if denied to the prisoner's witnesses, either he is allowed too great an advantage to acquit himself, or he is not allowed enough. 4 *St. Tr.* 178.

If all that his witnesses say without oath, shall have equal credit as if they swore it, then he hath too much advantage, for men may be found who will say falsely what they will not swear. How then doth a defendant say in a *plea at law* that a deed is not his, which yet in an *answer in Chancery* he will confess to be his? If his witnesses shall not have credit, because not sworn, to what purpose then is it permitted him to produce them? If they shall have credit, but not so much as if sworn, how much credit shall be given? Is it two, three, or ten witnesses, without oath, shall be equivalent to one upon oath? And besides, that question never was nor can be answered, what credit shall be given them? There is an unreasonable disadvantage put on the prisoner, that a witness produced on his part of equal credit with the witness against him, shall not have equal credit given him, because he is not on his oath, whereas he is ready to deliver the same things on his oath, if the court would administer it to him: and yet that difference was taken in *Fitzharris's case*, 33 *Car.* 2. 3 *St. Tr.* 224. as to the credibility of *Everard* and *Oates*, the first being on his oath, the last not. 4 *St. Tr.* 178.

The above oppressive *rule* of the courts, of law it cannot be called, for common law is common sense, and common sense repels cruelty and oppression, was, as Sir *William Blackstone* states, an antiently and commonly received practice, derived from the civil law, and
which

which also to this day (the time of his writing) obtains in the kingdom of France. But to remedy a practice so partial, cruel, and subversive of public justice, in cases where the crown was immediately concerned, it was provided by statute, after the Revolution, "That every person indicted for high treason, whereby corruption of blood may be made, shall be admitted to make his defence by witnesses on oath." 7 Will. 3. ca. 3. 4 Blackst. Comm. 352, 353, 354.

But this statute being found defective, and not sufficiently extensive to remedy the inconvenience complained of, and there having been a constant immemorial practice, not to suffer witnesses to be sworn against the king; and the judges, (says *Hawkins*) being always tender of departing from the settled practice of their predecessors, and generally chusing rather to presume the evil (for an evil many of them acknowledged it to be) originally founded on some statute, or other good foundation, than to suffer the reasonableness of it to be nicely entered into, which might be an inlet to endless uncertainties, it was thought necessary further to enact—"That every person who shall be produced or appear as a witness, on behalf of the prisoner, before he, or she, be permitted to depose, or give any manner of evidence, shall first take an OATH, to depose *the truth, the whole truth, and nothing but the truth*, in such manner as the witnesses for the queen are by law obliged to do; and if convicted of any wilful perjury in such evidence, shall suffer all the punishments, penalties, forfeitures, and disabilities, which by any of the laws and statutes of this realm are, or may be inflicted upon persons convicted of wilful perjury." Stat. 1 Ann. ca. 9. sect. 3. Irish stat. 9 Ann. ca. 6. sect. 9. 2 Hawk. P. C. ca. 46.

It is also now settled law, although Lord Coke in his definition of an oath, intimates that none but *Christians* can be witnesses; though his opinion is not warranted by any authority, but contradicted by common experience, that Jews and all other persons professing to believe in a God, though neither believing in the old nor new testament, as Mahometans, Moors, Gentoos, Indians, &c. may

&c. may be witnesses, if sworn according to the ceremonies of the religion they profess. 1 *Atkins* 31.

CHAPTER III.

Of opening to the court the nature of the evidence intended to be given.

Rule.

COUNSEL ought not to call witnesses without first opening to the court the nature of the evidence they intend to examine to. This has been often solemnly adjudged, though not strictly adhered to in practice.

As in the case of *AMBROSE ROOKWOOD*, sessions of *Oyer and Terminer*, at *Westminster*, 8 *Will.* 3. before *HOLT*, C. J. and *TREBY*, *POWELL* and *AYRE*, J's. 4 *St. Tr.* 661.

And also in *ANNESLEY, v. The EARL of ANGLESEY*, *Excheq. Ireland*, 1743. 16 *Geo.* 2. 9 *St. Tr.* 380.

CHAPTER IV.

In what cases evidence must be given in the presence of the prisoner.

Rule the First.

IT is a settled rule of law, that no evidence is to be given against a prisoner but in his presence. 2 *Hawk.* P. C. ca. 46.

And therefore in the *KING, v. PAINE*, B. R. *Hil.* 7 *Will.* 3. on an information against the defendant, charging him as the composer, author and publisher of a malicious libel, against the late queen *ANNE*, styled, "Her Epitaph:" it became a question, whether the depositions
of

of one *Brereton*, who was dead, which had been taken before the mayor of Bristol, the prisoner not being present, should be read.

And the COURT of KING'S BENCH, after taking the opinion of the COURT of COMMON PLEAS then sitting, determined that these depositions should *not* be given in evidence, the defendant not being present when they were taken by the magistrate, and so had lost the benefit of a cross examination. 5 *Mod.* 165.

Rule the Second.

The determination in the above case having never been questioned, it appears to be established, that the depositions of a witness taken *ex parte*, before a magistrate, on an examination concerning a *misdemeanor*, cannot be read in evidence on the trial of the party after the death of the deponent. 1 *Salk.* 281. *Holt.* 294. *Comb.* 358. S. C.

And the statute of 2 and 3 *Philip and Mary*, ca. 10. which permits informations of persons deceased taken judicially, that is in the presence of the party charged, to be read in evidence, after the death of the party swearing, is confined to felonies. *Irish Stat.* 10 *Car.* 1. ca. 18. 2 *Hawk. P. C.* ca. 46.

CHAPTER V.

Of the number of witnesses required in capital cases at common law and by statute; with readings on the statutes of EDWARD the Sixth, PHILIP and MARY, and WILLIAM the Third, respecting the number of witnesses necessary to a conviction for high treason.

Rule the First.

IN cases of *felony* a single *credible* witness has always been considered sufficient to convict a prisoner.

The epithet "*credible*" has a clear precise meaning. It is not a term of art appropriated only to legal notions
but

but has a signification universally received. It is never used as synonymous to *competent*; when applied to testimony it pre-supposes the evidence given. After the *competence* of a witness is allowed, the consideration of his credibility arises, and not before. Persons undoubtedly credible cannot be witnesses under particular circumstances: persons manifestly incredible may be, and often are witnesses. In acts of parliament which direct convictions upon the oaths of witnesses, the epithet "*credible*" is added, but by no means intended to signify *competent*, that is implied in the term "*witness*," but it is intended, from abundant caution to declare, that though competent witnesses swear positively, their credibility is to be weighed; and if the magistrate thinks the evidence not credible, he ought not to convict. *Wyndham, v. Chetwynd, 1 Burr. 414. Vide Abraham's, v. Bunn. post.*

From the above opinion of Lord MANSFIELD, and his decision in the other case cited, it is clear that the question of *competency* is to be determined by the Court, the question of *credibility* by the Jury.

Rule the Second.

In cases of *treason* as well as in cases of *felony*, the evidence of *one* credible witness, has from the Norman conquest down to the first year of *Edward the sixth*, also been held sufficient to convict.

And so it is held by *Hawkins*, who says, to support an indictment for high treason, before the first of *Edward the sixth*, no certain number of witnesses was required upon the indictment; or trial of any other crime whatever. 2 *Hawk. P. C. ca. 25.* 3 *Keble* 68. *B. Corone* 228. 2 *Jones* 233.

For it appears to be generally agreed, that the statute of the 1 and 2 of *Philip and Mary*, in restoring the order of trial by the course of the common law, took away the necessity of *two* witnesses in all cases within those statutes; from whence it plainly seems to follow,
that

that they were not required by the common law.
2 *Hawk. P. C. ca. 25. B. Cor. 220. S. P. C. 164.*

And in *Trinity* 2 and 3 of *Philip* and *Mary*, a doubt having arisen among the judges and king's serjeants, on statute 35 *Hen. 8. c. 2.* which enacts, "That all trials hereafter to be awarded or made for any treason, shall be had and used only according to the due order and course of the common law of this realm, and not otherwise, &c." it was resolved that the intent of the statute of *Philip* and *Mary, ca. 10.* was to remove the two accusers and two witnesses. *Dyer* 132. 1 *Jones* 123. *Keil.* 18. 49.

And Sir MATTHEW HALE in his reading on this statute, says, That as to all other persons, except clipping and coining, it has been controverted whether the general clause in the statute of *Philip* and *Mary, ca. 11.* hath taken away the necessity of two witnesses upon the trial, if there were no more in the case. 1 *Hale, P. Cr.* 298, 299, 300.

However, it has been holden by some, that by the ancient common law, one witness was not sufficient to convict any person of *high treason*. But granting that one witness was not sufficient for a conviction, it doth not follow but he might be sufficient for an indictment, 2 *Hawk. P. C. ca. 25.* See Sir JOHN FENWICK's case, 5 *St. Tr.* 70.

That two witnesses were required at common law, was the opinion of Sir EDWARD COKE. The words of that great lawyer are—"But it seemeth by the ancient common law, one accuser or witness was not sufficient to convict any person of high treason; for in that case, where there is but an accuser, it shall be tried before the constable and marshal, by combat, as by many records (which he cites) appeareth. But the constable and marshal have no jurisdiction to hold plea of any thing which may be determined or discussed by the common law. And that two witnesses be required appeareth by our books, and I remember no authority in our books to the contrary; and the common law herein is grounded upon the LAW OF God, expressed in the Old and New Testament. In

"*ore duorum aut trium testium peribit qui interficietur :*
 "*Nemo occidatur uno contra se dicente testimonium.* 3 *Inst.* 26.

The passages of Scripture to which the learned COKE refers as authentic, are :

First, At the mouth of two witnesses or three witnesses shall he that is worthy of death be put to death: but at the mouth of one witness he shall not be put to death. *Deutr. ca. 17. v. 6.*

Second, One witness shall not rise up against a man for any iniquity or for any sin, in any sin that he sinneth; at the mouth of two witnesses, or at the mouth of three witnesses shall the matter be established. *Deutr. ca. 19. v. 15.*

Third, But if he will not hear thee then take with thee one or two more, that in the mouth of two or three witnesses every word may be established. *Matthew ca. 18. v. 16.*

Fourth, This is the third time I am coming to you, in the mouth of two or three witnesses shall every word be established. 2 *Corint. ca. 13. v. 1.*

Fifth, He that despiseth Moses's law died without mercy under two or three witnesses. *Hebr. ca. 10. v. 28.*

Serjeant HAWKINS commenting on the above opinion of the author of the institutes observes, that however the law might have stood in relation to those matters before the conquest, it seems to be wholly altered long before the *stat. Edw. 6.* and it is not supported by the generality of the authorities cited by Sir EDWARD COKE, which wholly relate either to the proof of an effoin, or a summons in a real action, or of the default of persons summoned on a jury, or other matters less to the point. And HAWKINS cites *Brac. 354.* 35 *Hen. 6. 46,* 47. 48 *Edw. 3. 30.* 15 *Edw. 4. 1.* 2. *Hawk. P. C. ca. 25. sect. 129.*

And as to the passages of Scripture, he says, it may be answered, that those in the Old Testament concern only the judicial part of the Jewish law, which being formed for the particular government of the Jewish nation, doth not bind us any more than the ceremonial; and that in the New Testament contain only prudential rules for the direction of the government of the church
 in

in matters introduced by the gospel, and no way controul the civil constitution of countries. *Ibid.*

To which may be added that, whatever may be said either from reason or from scripture, for the necessity of two witnesses in treason, holds as strongly in other capital causes, and yet it is not pretended that there is, or ever was any such necessity in relation of any other crime but treason. 2 *Hawk. P. C. ca. 45.* 1 *Hales P. C. 299.*

Baron MONTESQUIEU, in his twelfth book, which treats of those laws that form political liberty as relative to the subject, says, those laws which condemn a man to death on the deposition of a single witness, are fatal to liberty. In right reason there should be two; because a witness who affirms, and the accused who denies, make an equal balance, and a third must incline the scale. *Spirit of Laws, b. 12. ca. 3.*

The marquis BECCARIA delivers the same opinion in nearly the same words. In his judgment, one witness is not sufficient; for whilst the accused denies what the other affirms, truth remains suspended, and the right that every one has to be believed innocent turns the balance in his favour. *Essay on crimes and Punishments, 35.*

Sir WILLIAM BLACKSTONE considers this opinion as carrying matters too far, for there are some crimes in which the very privacy of their nature excludes the possibility of having more than one witness: must these therefore escape unpunished? Neither indeed is the bare denial of the person accused equivalent to the positive oath of a disinterested witness. In cases of indictment for perjury this doctrine is better founded, and there our law adopts it, for one witness is not allowed to convict a man indicted for perjury, because then there is only one oath against another. In case of treason also there is the accused's oath of allegiance to counterpoise the information of a single witness; and that may perhaps be one reason why the law (in England not in Ireland) requires a double testimony to convict him. Though the principal reason undoubtedly is, to secure the subject from being sacrificed to the fictitious conspiracies which have been engines of profligate and

crafty politicians in all ages. 4 *Comm. ca.* 27. p. 351. Vide the rev. *William Jackson's case*. *Post*.

Another reason may be added, that in proportion to the atrocity of the offence, the evidence against the party charged should be credible, strong and conclusive.

Chief justice KELYNG says, the question, whether at this day there needs be two witnesses to convict a man of high treason, hath grown only upon the opinion of COKE, who, amongst other things, delivers an opinion that, at common law, two witnesses are necessary in cases of treason, and cites many books in the margin: but none of them warrant any such opinion, and there are many things in his posthumous works, especially in his "Pleas of the Crown" concerning treasons, and in his "Jurisdiction of the Courts" concerning parliaments, which lie under a suspicion whether they received no alteration, they coming out in the time of that which is called the long parliament, in the rebellion against king Charles the first. *Kelyng* 49.

It has been before stated, that previous to *stat. 1. Edw. 6.* no certain number of witnesses was required upon the indictment or trial of any crime whatever. 2 *Hawk. P. C. ca.* 25. 3 *Keb.* 68. 2 *Jones* 233.

For it seems, says *Hawkins*, to be generally agreed, that the *statutes 1 and 2 Phil. and Mary*, in restoring the order of trial to the course of the common law, took away the necessity of two witnesses in all cases within those statutes, from whence it seems to follow, that they were not required by the common law. 2 *Hawk. P. C. ca.* 25.

In lord STAFFORD's case, 23 *Car. 2. anno* 1681, it became a question, whether two witnesses were necessary, as required by the 1 *Edw. 6. ca.* 12. and 5 *Edw. 6. ca.* 11. which require two witnesses for convicting a traitor and for finding the indictment? And, NORTH, C. J. and his brethren held, that when the prisoner is charged with the offence of killing the king, and that the evidence is, that he several times laboured it, and by several ways, and to each particular time and fact there is but one witness, and yet that every of the said facts conduced directly to the effecting and perpetration of the

the fact and treason charged upon the prisoner, such evidence was sufficient within the statute. But otherwise it had been if the fact had been tending to another several treason. And the reason given by the learned judges, why such evidence was good, was—because otherwise it would be a most difficult thing, and almost impossible to convict any one of high treason for compassing the death of the king, for such compassings are seldom acted in the presence of two witnesses at one time present. On this occasion, in the house of lords it was suggested, that the reason of two witnesses in treason was, that antiently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law now, and then, in use all over the christian world; none can be condemned of heresy, but by two lawful and credible witnesses; and bare words may make a heretic but not a traitor, and antiently heresy was treason, and from thence the parliament thought fit to appoint that two witnesses ought to be for proof of high treason. *Ray. 408.*

Rule the Third.

In England no person can be legally accused or convicted of treason, except treason respecting the coin, but on the evidence of at least two lawful witnesses.

By *stat. 1 Edw. 6. ca. 12.* It is enacted, “That no person or persons shall be indicted, arraigned, or condemned, or convicted of any offence of treason, petit treason, or misprision of treason, &c. unless the same offender or offenders be accused of two sufficient lawful witnesses, or shall willingly without violence confess the same.” This statute was never enacted in Ireland.

By *stat. 5 and 6 Edw. 6. ca. 11. sec. 8.* it is further enacted, “That no person or persons shall be indicted, arraigned, condemned, convicted, or attainted for any of the treasons in the act mentioned, or for any other treasons which then were, or after should be, which should be perpetrated, committed, or done, unless the same offender or offenders be thereof accused

“ cused by two lawful accusers ; which said accusers at
 “ the time of that arraignment of the party so accused,
 “ if they be then living, shall be brought in person be-
 “ fore the party so accused, and avow and maintain
 “ what they have to say against the said party to prove
 “ him guilty of the treasons or offences contained in the
 “ bill of indictment laid against the party arraigned,
 “ unless the said party arraigned shall willingly, without
 “ violence, confess the same.” No such statute in Ireland.

By *stat. 1 and 2 Phil. and Mary ca. 11.* it is enacted,
 “ That all trials after that statute to be had, awarded,
 “ or made, for any treason, shall be had and used only
 “ according to the due course and order of the common
 “ law.”

Also, by *stat. 1 and 2 of Phil. and Mary, ca. 11.* it is
 enacted, “ That all and every person and persons who
 “ shall be accused or impeached of any of the offences
 “ contained in that statute, or of any other offence or
 “ offences concerning the impairing, counterfeiting, or
 “ forging of any coin current within this realm, shall
 “ and may be indicted, arraigned, tried, convicted, or
 “ attainted by such like evidence, and in such manner
 “ and form as has been used and accustomed within the
 “ realm, at any time before the first year of *Edw. 6.*”

By *stat. 7 Will. 3. ca. 3.* it is enacted, “ That no
 “ person or persons whatsoever, shall be indicted, tried,
 “ or attainted of high treason, whereby any corruption
 “ of blood may or shall be made to any such offender
 “ or offenders, or any the heir or heirs of such offender
 “ or offenders, or of misprision of such treason, but by
 “ and upon the oaths and testimonies of *two* lawful wit-
 “ nesses, both of them to the same overt act, or one of
 “ them to one, and another of them to another overt
 “ act of the same treason, unless the party indicted or
 “ arraigned, or tried, shall willingly, without violence,
 “ in OPEN COURT confess the same, or shall stand mute
 “ or refuse to plead, or in cases of high treason shall
 “ peremptorily challenge above the number of thirty-
 “ five of the jury.”

On the above cited English statutes, so far as they
 respect the necessity of two witnesses, the following par-
 ticulars

ticulars have been laid down as rules, by serjeant HAWKINS, in his Pleas of the Crown. *Vol. 2. ca. 25.*

Rule the Fourth.

That where the statute of the 1 of *Edw. 6.* require that the party be accused by two lawful witnesses, and that the 5 and 6 *Edw. 6.* that he be accused by two lawful accusers, they both mean the very same thing, because the common law admits of no other accusers but witnesses. 2 *Haw. P. Cr. ca. 25.*

And the same point is agreed by sir MATTHEW HALE and sir EDWARD COKE. *Hale's P. C. 301. 3 Inst. 25.*

This rule is supported in the case of *Christopher Low*, before the high court of justice. HALE, who was his counsel, insisted, that two witnesses are necessary upon the trial in case of treason, upon the foot of the statutes of *Edw. 6. not repealed*, he saith, in point of testimony by the statute of *Phil. and Mary*: and sir Thomas Witherington, one of the counsel on the side of the prosecution, who argued with candor, admitted that the statutes of *Edw. 6.* are not repealed by that of *Phil. and Mary*; and that two witnesses are still necessary; but insisted that one witness to one overt-act and another to another overt-act of the same species of treason, are two witnesses within the act. And so it has been held ever since the restoration. 2 *State Tr. 144, 171, to 173 and 177. Fost. 235. 1 Hale P. Cr. 296. Summ. 262.*

And adds *Foster*, this gentleman (sir William Witherington) was the first who considered the point in this light, in which it hath been considered ever since the restoration. *Fost. 235.*

Rule the Fifth.

It is not required either by statute the first or the fifth and sixth of *Edward the sixth*, that such accusers or witnesses be present with the indictors in person, but that they may send their accusation to the indictors in writing under their hands, which will be sufficient, even after their

their death. 2 *Hawk. P. C. ca. 25.* S. P. C. 164. *B. Corane* 2. *Summ.* 208.

Sir EDWARD COKE declares a contrary opinion. He says, it is most necessary as many do hold, that there should be two lawful *accusers*; that is, two *lawful witnesses at the time of the indictment*; for, the indictment is commonly found in the absence of the party accused, and it may be when the party suspected is beyond sea, or in remote parts, and may be outlawed thereupon, and therefore seeing the indictment is the foundation of all, it must be necessary to have substantial proof in a case so criminal, where *probationes oportent esse luce clariores.* 3 *Inst.* 25, 26.

It is observable, that none of the commentators on the acts of *Edw. 6.* expressly say, that such accusation must be upon oath. But it is clear it cannot be intended that the accusation may be without oath, for how can any accuser be said to be a lawful witness, if he be not upon oath; for MATTHEW HALE also expressly says, that the party to the treason that confessed it, may be one of the two accusers or witnesses in case of treason, for the statute intended two such witnesses that were *allowable witnesses at common law*: and at common law no witness can be examined but on oath. 2 *Hawk. P. C. ca. 25.* 1 *Hale P. C.* 304. *Leach, Cr. Ca.* 128. *Post*.

But if any reasonable doubt existed on this point, it is now completely settled by 7 *Will. 3.* as to the treasons within that statute, which expressly provides, "That no person shall be *indicted* thereof but by and upon the *"oath and testimony of two lawful witnesses."*

Rule the Sixth.

One who can only witness by hearsay what he has heard a good witness say, is not a lawful accuser within any of these statutes. For, if this were to be allowed, nothing would be more easy than in any case, where there is one witness, to get a second, which would totally elude the provision of the statutes in requiring two lawful witnesses. 2 *Hawk. P. C. ca. 25.*

Yet

Yet in THOMAS's case, *East. 1 Mary*, it was holden for law, that of two accusers, if one be an accuser of his own knowledge, or of his own hearing, and he relate it to another, the other may well be an accuser; and thus did sir *Nicholas Arnold*, who accused *William Thomas* of words which sounded and tended to the death and destruction of the queen, of his own hearing, and at the request of *William Thomas*, he reported over the same matter to sir *James Crofts*; sir *James Crofts* may be an accuser in this case with *Arnold*; and sir *James Crofts* reports this over to *John Fitzwilliams*, who was supposed a man fit to have killed the queen, and he reports it over to sir *Thomas Wyat*, &c. so each of them may be an accuser. *Dyer 99. b.*

This abominable and illegal doctrine, or as sir EDWARD COKE terms it, this *strange conceit*, that one may be an accuser by hearsay, was utterly denied by the justices in the lord *Lumley's* case. *Hil. 14 Eliz. 3 Co. 25.*

But if it be hearsay from the offender himself, confessing the fact, such a testimony upon hearsay makes a good witness within the statute. *1 Hale, P. C. 306. Vide Confession. Post. . ca.*

On the above case of *William Thomas*, FOSTER has animadverted with unusual severity and marked reprobation.

"I do not find," says that excellent judge, "upon looking over the state trials, that in crown prosecutions any great regard was paid to the acts of *Edw. 6.* for near a century after they were passed, or indeed to the common well-known rules of legal evidence. Though the authors who wrote in those days do sometimes speak of the acts as then in force. In the case of *William Thomas*, when they were undoubtedly in force, they were rendered quite nugatory by this very extraordinary resolution, that one witness of his own knowledge, and another by hearsay from him, though at the third or fourth hand, made two witnesses or accusers within the act." *Fost. 234.* And,

In the case of sir NICHOLAS THROCKMORTON, which came to trial the same term, no sort of regard was paid to them. For though the prisoner strongly insisted on

the benefit of them, particularly of that which requireth the witnesses to be brought face to face upon the trial; the counsel for the crown went on in the manner formerly practised, reading examinations and confessions of persons supposed to be accomplices, some living and amenable, and others lately hanged for the same treason. *Ibid.* 1 *St. Tr.* 68.

In many of the succeeding trials, the prisoners were told that the statutes of *Edw. 6.* were repealed; particularly that which required two witnesses face to face; that this law hath been found dangerous to the crown; that witnesses may be prevailed upon to unlay in court what they have said upon their examinations; that the confession of persons accusing themselves are the strongest of all evidence against their accomplices; that their partners in guilt are *gens de leur condition* the statute of treasons speaks of; and that confessions though not signed by the party, are of equal weight with those that are signed. *Ibid.*

This every man who will do so much penance as to read over the state trials during the reigns of queen *Elizabeth* and king *James*, will find to have been the doctrine and practice of the times! *Ibid.*

In succeeding times, when people of all ranks and parties had in their turn been learning moderation in the school of adversity, light began to dawn upon us. Lord COKE after his disgrace at court had given him leisure for cool reflection, was of opinion that the statutes of *Edw. 6.* touching evidence are not repealed by the 1 and 2 *Phil. and Mary*; that two witnesses are still required in cases of treason, not barely upon the indictment, which he stateth as an opinion entertained by some, but also upon the trial. This, says *Foster*, as far as I can collect from the passages I have cited, was the result of all his searches in this matter; though he doth not in every part of the passages express himself with that light and precision which the importance of the subject required. *Fost.* 235. *Vide* 3 *Inst.* from 24 to 27. *Ante Mr. Love's case, p.*

Rule the Seventh.

One witness to one, and another witness to another overt-act of the very same treason, are sufficient within the statutes of the 1 and 5 and 6 of *Edw. 6.* and the express words of 7 *Will. 3.* are agreeable hereto. 2 *Hawk. P. C. ca. 25.*

And so it was ruled in lord STAFFORD's case, 32 *Car. 2.* before the lords, on an impeachment by the commons of high treason, for hiring a person to kill the king. *Dugdale* swore that the prisoner proffered him five hundred pounds to perpetrate the fact; and *Dates* swore that the prisoner received a commission to be paymaster to an army to be raised by the roman catholics; and *Tubberville* swore, that five or six years before that time, the prisoner, at Paris, proffered him a good reward to kill the king.

Upon this evidence a question was put to the judges there attending (*SCRAGGS*, C. J. absent) whether the evidence given was sufficient for convicting the prisoner, notwithstanding the stats. of 1 *Edw. 6. ca. 12.* and 6 *Edw. 6. ca. 11.* which require two witnesses for convicting a traitor, and here is but one witness to each fact?

The JUDGES answered, when the prisoner is charged with the offence of killing the king, and that the evidence is, that he at several times laboured it, and by several ways, and to each particular time and fact there is but one witness, and yet every of the said facts conduces directly to the effecting and perpetration of the fact and treason charged upon the prisoner, such evidence is sufficient within the statutes.—

But otherwise it had been, if the facts (given in evidence) had been tending to another several treason.

And the reason given why such evidence was good was, because otherwise it would be a most difficult thing, and almost impossible to convict any one of high-treason for compassing the death of the king, for such compassings are seldom acted in the presence of two witnesses at one time present.

On this occasion the CHANCELLOR said, that antiently most of the judges were churchmen, and by the canon law none can be condemned for heresy but on evidence of two lawful and credible witnesses, and bare words may make a heretick, but not a traitor, and antiently heresy was treason: and from thence the parliament thought fit to appoint that two witnesses ought to be for proof of high treason. *Sir Thos. Raym.* 407. 3 *St. Tr.* 101. 2 *Hale P. C.* 286.

FOSTER observing on this determination in lord STAFFORD's case, says, from that time the point hath been settled. And in the succeeding trials of that reign and the next, though many irregular things were done favourable to the times, this rule still kept its ground, And in all the trials after the revolution, before the act of the 7 *Will.* 3. took place, it was strictly observed. *Foster* 237. 4 *St. Tr.* 691, 697. *Rookwood's case*, 8 *Will.* 3. 5 *St. Tr.* 22. *Vaughan's case*, 8 *Will.* 3.

FOSTER also lays it down as a general rule, that all collateral facts, not conducing to the proof of the overt-acts, may be given in evidence on a trial for high treason—for whatever was evidence at common law is still good evidence under the statute, which is confined to the proof of the overt-acts. *Foster* 242. 2 *Salk.* 634. *Vaughan's case*. 5 *St. Tr.* 17.

Or by the confession of the prisoner, for the words of the statute are confined to the overt-acts. 8 *St. Tr.* 255. *Foster* 242. *Vide Confession, Post.*

Rule the Eighth.

The statute the 1 and 2 *Phil. and Mary*, ca. 10. by enacting, "That all trials of treason shall from henceforth be according to the course of the common law," doth not take away the necessity of two witnesses upon an indictment required by the 1, 5 and 6 *Edw.* 6. c. 6. because the indictment is no part of the trial, but is more properly the accusation to be tried. 2 *Hawk. P. C.* ca. 25. *S. P. C.* 90, 164. *B. Cor.* 220.

FOSTER on this subject saith, a difference hath been taken in the construction of the statutes of *Edw.* 6. and *Phil.*

Phil. and Mary, between the indictment and the trial; but this distinction is entirely without foundation, even upon the foot of those statutes. But the present act hath not left room for that distinction. It enacteth, "That no person shall be *indicted*, tried, or attainted of high treason, whereby any corruption of blood may be made to the offender, or his heirs, or of misprision of such treason, but upon the oaths of two lawful witnesses, either both to the same overt-act, or one of them to one, and the other of them to another overt-act of the SAME TREASON, unless he shall willingly, without violence, in OPEN COURT, confess the same, or shall stand mute, or refuse to plead, or in cases of high treason shall peremptorily challenge above the number of thirty-five of the jury." 7 *Will.* 3. *ca.* 3. *sect.* 2.

The case of sir JOHN FENWICK, 1696, 8 *Will.* 3. shews the restriction in the above clause of statute the 7 *Will.* 3. on the English courts of justice to be imperative. In that case it was ruled, that the information of a witness taken upon oath, before a justice of peace, being joined with the evidence of one other witness only, could not in the ordinary courts of justice amount to a sufficient evidence within the above statute, which requires two witnesses in high treason, and therefore it was thought necessary to proceed in that case by bill of attainder in parliament; whose power, says *Hawkins*, excusing the proceedings, can be restrained by no rules but those of natural justice. 5 *St. Tr.* 40. *Hawk. P. C. ca.* 46.

And in the proceeding on this bill, by the influence of the court, within one year after the passing of a statute, enacted, as BLACKSTONE says, for the purpose "of securing the subject from fictitious conspiracies, the engines of profligate and crafty politicians," by requiring a double testimony to convict; a majority of the representatives of the people of England established a precedent, dispensing with rules of evidence, which they had recently established as law. A proceeding the more extraordinary, when it is remembered that at the revolution, 1698, king WILLIAM in his declaration to the people stated,

stated, that "OPPRESSION ON TRIALS" was one cause of his coming into England. *Vide the declaration.*

It is also provided by the above statute, "that any person being indicted as aforesaid, for any of the said treasons or misprisions, may be outlawed and thereby attainted. And in the cases of the high treasons aforesaid, where, by the law, after such outlawry, the party outlawed may come in and be tried, he shall upon such trial have the benefit of this act." *Sec. 3.*

And it farther enacteth and declareth, "That if two or more distinct treasons of divers heads or kinds shall be alledged in one bill of indictment, one witness to one of the said treasons, and another to another of the said treasons, shall *not* be deemed two witnesses to the same treason, within the meaning of the act." *Sec. 4.*

Rule the Ninth.

The said statute of the 1 and 2 *Phil. and Mary* doth not extend to misprision of treason. But this is expressly provided for by statute 17 *Will. 3.* as to such treasons as are within that statute, and therefore there must be two witnesses to the indictment as well as to the trial of such misprision. 2 *Hawk. P. C. ca. 25. Vide the stat. Will. 3. immediately above cited.*

Rule the Tenth.

That petit treason is within *stat. 4, 5 and 6 Edw. 6.* and 1 and 2 *Phil. and Mary, c. 10.* but not within the 7 *Will. 3.*

From whence it follows, that two witnesses are required to the indictment, and not to the trial of that offence, and that two witnesses are not necessary even upon the indictment, if the party upon his examination confesses it. 2 *Hawk. P. C. ca. 25. B. Cor. 220. 3 Inst. 24. Foff. 233.*

Rule

Rule the Eleventh.

The statute of the 1 *Phil. and Mary, c. 11.* which enacts, "That all persons accused of any offences concerning the impairing, counterfeiting, or forging the coin, shall be indicted and tried as at the common law," hath been construed to extend to clipping, and all other offences in impairing the coin, which have been made treason since the said *stat. 1 and 2 Phil. and Mary.*

From whence it may be argued, that *stat. 7 Will. 3.* by "expressly providing, that nothing therein shall extend to high treason for counterfeiting the coin," intended in like manner, that it should not extend to any other high treason concerning the coin. 2 *Hawk. P. C. c. 25.* 2 *Jones* 233. 3 *Keb.* 68.

From the authorities cited, two rules clearly result—

Rule the Twelfth.

First, That the common law did not require *any certain* number of witnesses, on the trial of any crime whatsoever. 2 *Hawk. P. C. ca. 46.*

Rule the Thirteenth.

Secondly, That *stats. 1 Edw. 6. ca. 12. and 5 and 6 Edw. 6. ca. 11.* which required two witnesses in treason, were not repealed by *stat. 1 and 2 Phil. and Mary,* which ordered that all trials for treason should be according to the course of the common law; and therefore that it is still necessary in all trials for high treason, not concerning the coin, to have either two witnesses to the same overt-act, or one witness to one, and another witness to another overt-act of the same kind of treason. 2 *Hawk. P. C. ca. 46.*

On the authority of the first of the rules, and in as much as the statutes of *Edward the sixth, Philip and Mary,* and *William the third,* never were enacted in Ireland, the judges, so far as related to the number of witnesses, proceeded on the trial of the reverend WILLIAM JACKSON, at Bar, B. R. Dublin, *Easter, 1795*; and also on the several

several subsequent trials for the same offence, by *commissioners of oyer and terminer, Dublin, December 1795, February 1796, &c.*

Curran, Ponsonby and Mac Nally, assigned counsel on those trials for the prisoners, revived and urged the doctrine of *sir EDWARD COKE*, that two witnesses, credible in their persons, and concurrent in supporting the allegation of one integral and substantive class of treason, were necessary at common law to convict of high treason, notwithstanding the obiter opinion of *sir MICHAEL FOSTER*. That the statutes of *Edw. 6. and Will. 3.* though not enacted in Ireland, were declaratory of a great principle of justice, and the common law of the land. That these statutes did not create, but revived that principle which had only slept, but never expired; and, that by the revival an end was put to an innovating abuse of the common law, the antient rule of which was, that no man could be lawfully indicted or convicted of high treason, but on the testimony of two lawful witnesses, unless he confessed the fact.

The *attorney-general (Wolfe)* answered, and lord CLONMELL, C. J. DOWNES and CHAMBERLAIN, J. ruled, that the common law of England and Ireland were the same; and by that law one credible witness swearing to the fact laid, and those facts being the acts of the prisoner, and manifesting his treasonable intention, was sufficient to convict, in cases of high treason, if the jury believed that witness; and that the stat. of king *William the third*, which require two witnesses, was confined to England, and not of effect in Ireland. *Vide Jackson's trial by Ridgeway.*

Every man who has read the parliamentary history of that æra, when the liberties of Ireland were claimed, when *Poyning's law* was repealed, and when the appellate jurisdiction of the lords was re-established, and the freedom of the subject fortified by the *habeas corpus act*, must wonder that the men who brought about the reformation of Ireland, did not also procure the passing of a statute similar to that of the *7 of Will. 3.* in England. But probably that act was considered by the Irish legislators of that day, as declaratory of an antient principle
of

of common law. They did not recollect to adopt the language of *Curran*, in *Jackson's* case, "That the breath which in England cannot so much as taint the character of the accused, shall, because he is in Ireland, blow him from the face of the earth. That he who would in Great-Britain be secure from an individual enemy, must, because he is to be tried in Ireland, perish under his single accusation." Yet such is the distinction in the law of treason, between the two countries. But now that a political union has incorporated them into one kingdom, governed by one parliament, the law respecting evidence on trials for high treason, will, no doubt, be made common to all the king's subjects, by extending the statutes of *Edward the sixth*, *Philip and Mary*, and *William the third*, to those who are resident in Ireland. Clearly the subjects of the united kingdom, resident in Ireland, are intitled to every protection enjoyed by those who reside in England. The law which takes away the life of a man, should ever be wise, and should ever be uniform. Distinctions such as still exist in the law of treasons, are invidious and tend to discontent. If these English statutes were enacted because in cases of treason the oath of allegiance counterpoises the information of a single witness, is not an Irishman intitled to the benefit of that reason?—or, if the principal reason for enacting those statutes was, as sir WILLIAM BLACKSTONE states, "To secure the subject from being sacrificed to fictitious conspiracies, which have been engines of profligate and crafty politicians in all ages," why should not Irishmen be granted the same security, from such conspiracies and the machinations of such politicians? The imperial parliament have to discuss and determine those questions at a future day. *Vide Blackst. Comm.* 351.

Bishop BURNET makes a serious objection to the *stat. 7 Will. 3.* and his principles appear strongly urged in the case of sir *John Fenwick*, by those who supported the bill of attainder. The bishop says, "This act passed after a long struggle, contrary to the hopes and expectations of the persons then at the head of affairs," it was carried by the tories, and "the design of it

seemed to be, to make men as safe in all treasonable "conspiracies and practices, as was possible." *Burnet's Hist. his own Time. 3 edit. Lond. 1766. p. 194, 222.*

On this opinion sir MICHAEL FOSTER critically observes, that had the bill required two witnesses to the same fact, at the same time, as his lordship said it did, it would indeed have rendered men very secure in treasonable practices; but then it will be difficult to reconcile this to what the bishop saith in a few lines afterwards. For, after setting forth the substance of some of the principal clauses, particularly that relating to two witnesses to the same fact, at the same time he addeth—"all these things were in *themselves just*, and if they had been moved by *other men*, and at *another time* they would have met with *little opposition*."

So that it appears the bishop's objection was not to the *principle* of the bill, but to the *authors* of the bill and their party.

Rule the Fourteenth.

It is a settled general rule, that whatever was evidence at common law, is still good evidence under the statute the 7 of Will. 3.

It appears by this rule that it is still necessary, in all cases of high treason not concerning the coin, to have either two witnesses to the same overt-act, or one witness to one overt-act, and another witness to another overt-act of the same treason; this point is now finally settled, it being enacted, that no evidence shall be admitted of any overt-act that is not expressly laid in the indictment, by *stat. 7 Will. 3. ca. 3. sec. 2. 4.*

FOSTER commenting on this statute of king William, says, but though it requireth two witnesses to each treason, yet a collateral fact not tending to the proof of the overt-acts may be proved by *one*. For this statute confineth itself to the proof of the treason, THE PROOF OF THE OVERT ACTS. And the *statutes of Edw. 6.* are confined to the evidence for proving the prisoner guilty of the offences charged on him, which likewise must be understood of overt-acts. *Fost. 240.*

In

In the KING, v. VAUGHAN, *admiralty sessions*, November 1696, 8 Will. 3. the difference between the proof of the overt-acts and of collateral facts, was taken by lord HOLT, C. J. the prisoner insisted and called witnesses to prove he was a subject of France, born in the dominions of the French king. The counsel for the crown called witnesses to prove him born in Ireland, and his counsel insisting that there was but one credible witness to that fact, HOLT, C. J. said, "That is no overt-act, if there be one witness to that it is enough; there need not be two witnesses to prove him a subject, but here be more." 5 St. Tr. Sack. 634. & C. *Vide ca. Conf. Post.*

The KING, v. WILLIS, *admiralty sessions*, 7 Ann. confirms the opinion of HOLT. He was indicted for adhering to the queen's enemies on the high seas, He made alienage his defence as Vaughan had done, and his confession that he was an Englishman was admitted, though his counsel insisted on the *stat.* 7 Will. 3. It was answered by the court, that the 7 Will. 3. was to prevent a confession from being *conclusive* evidence of the very overt-act, not to take away that sort of evidence of collateral matters. And Vaughan's case was relied on. *Fost.* 242. *Vide chap. Confession post.*

Sir MICHAEL FOSTER accedes to these decisions, observing, that in truth with regard to all collateral facts, not conducing to the proof of the overt-acts, we may safely lay it down as a general rule, that whatever was evidence at common law, is still good evidence under the statute, which is confined to the proof of the overt-acts. *Fost.* 242.

Rule the Fifteenth.

In all cases of high treason to which corruption of blood is not attached, the evidence of a single credible witness is sufficient to convict.

And so it was determined in the case of GAHAGAN, CONNOR, and MAPHAN, *Old Bailey sessions*, January 1748, before PARKER, C. B. and BURNETT, J. The prisoners were indicted for high treason, in filing and diminishing the

the current coin of the realm. One witness only was produced to prove the fact : and it was submitted to the court, whether upon the construction of *stat. 1 Edw. 6. ca. 12. 6 Edw. 6. ca. 11. 1 and 2 Phil. and Mary, ca. 10. and 7 Will. 3. ca. 3. sect. 2.* any person can be convicted of high treason upon the testimony of a single witness. And,

The court upon the authority of *Anstruther's case*, and the opinion of RAYMOND, C. J. *Old Bailey, October sessions, 1727*, as the case of *Ann Johnson*, held that one witness is sufficient to prove any treason, where there is no corruption of blood. *Leach. Cr. ca. 2. Edit. 39. 3 Edit. 50.*

In the KING, *v. ANSTRUTHER*, indicted on *stat. 5 Eliz. ca. 12.* for impairing the coin, cited in the above case, the prisoner was convicted on the evidence of one witness : and at a meeting of the judges at Serjeant's-Inn-hall, 6 May 1725, they were unanimous that the conviction was legal. *T. Jones 233.*

Here it is proper to observe, that by the general tenor of the act of *7 Will. 3.* it extendeth to such high treasons *only*, whereby "any corruption of blood may or shall be made to the offender or his heirs, and to the misprision of such treasons. *Fost. Cr. Law 222.*

The first and second sections are expressly confined to those treasons, and the misprisions of them : and all other clauses, except those relating to the trial of peers, and to the rejection of evidence of overt-acts not laid in the indictment, use words of plain reference to the treasons mentioned in the first and second sections. And the thirteenth section expressly excludeth the treasons of counterfeiting his majesty's coin, the great seal, privy seal, signet and sign manual. *Ibid.*

The case of *petit treason* therefore standeth upon the foot it did before this act, and so do the treasons that are expressly excluded. And all the treasons created by acts saving the corruption of blood. *Ibid.*

The statutes saving the blood are, *5 Eliz. ca. 1. sec. 10, 11, 12.* concerning the papal supremacy. *5 Eliz. ca. 11. 18 Eliz. ca. 1. 8 and 9 Will. 3. ca. 25. and 15 and 16 Geo. 2. ca. 28. touching the coin.*

FINIS

Rule the Sixteenth.

Two witnesses are required in proof of perjury : but the taking of the oath and the fact may be proved by one witness only.

In the *QUEEN, v. MUSCOT*, *Mich. 12 Ann. B. R.* this rule is laid down by PARKER, C. J. who, in summing up the evidence to the jury, among other things said : there is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent, and therefore a credible and probable evidence shall turn the scale in favour of either party : but in the former, presumption is ever to be made in favour of innocence, and the oath of the party will have a regard paid to it until disproved. But it must be a clear and strong evidence, and more numerous than the evidence given for the defendant, for else only oath against oath. *10 Mod. 195.*

For the rule respecting the competency of the party prejudiced by the perjury to prove the offence. *Vide 4 Burr. 2254. Abraham's qui tam, v. Bunn. Page .*

 CHAPTER VI.

In what cases, and under what circumstances the confession of a prisoner may be given in evidence, by authority of the common law, and by statute ; and, in what cases the confession of a prisoner is to be rejected, and of evidence by the confession of persons not on trial.

Rule the First.

THE confession of the defendant himself, taken upon an examination, in writing, before justices of the peace, in pursuance of the statutes of *Philip and Mary*, upon bailment or commitment for felony, is legal evidence against the party confessing. *2 Hawk. P. C. ca. 46. Summ. 192, 193, 262, 264.*

But

against him. 5 *Mod.* 165. This was refused in *Throckmorton's case*. 1 *Mary.* 1 *St. Tr.* 70.

Rule the Fourth.

The confession of the defendant himself in discourse with private persons, or before a magistrate, if not taken in writing, hath always been received as evidence against him. 2 *Hawk. P. C. ca.* 46.

As in *STONE's case*, *Trinity*, 4 *Eliz.* The prisoner, who was indicted for murder, was convicted on his own confession to two prisoners, confined with him in Newgate. *Dyer* 214. c. 215. a. *Francis's case*. 6 *St. Tr.* 58.

And in *HALL's case*, *Lent assizes*, *Stafford* 1790, it was held, that if a confession be not taken in writing, parol evidence of such confession is legal evidence, and a prisoner may be convicted thereon, although the facts be totally uncorroborated. *MS.*

Rule the Fifth.

The confession of one person cannot be received as evidence against others. 2 *Hawk. P. C. ca.* 46.

Yet in *THROCKMORTON's case*, *Guildhall, London*, 1 *Mar.* 1554, the duke of *SUFFOLK's* confession was read against him, imputing that he had been privy to the treasonable conspiracy, for which the duke had been executed. 1 *St. Tr.* 70.

So in the earl of *ESSEX's case*, for high treason, before the LORDS, at *Westminster*, 19 *February* 1600. 43 *Eliz.* the confession of sir *Ferdinando Gorges*, and sir *Charles Davers*, were read in evidence against the prisoner. 1 *St. Tr.* 197.

And in sir *WALTER RALEIGH's case*, tried for high treason, at *Winton*, by *special commission*, 1 *James I.* November 1603, before *POPHAM*, C. J. B. R. *ANDERSON*, C. J. Com. Pl. and *GAWDRY* and *WARBURTON*, J's. The attorney-general, sir *EDWARD COKE*, who conducted the prosecution for the crown, caused the confession of lord *Cobham* to be read in evidence against sir *Walter*—but on this occasion, as the prisoner observed,
Mr.

Mr. attorney neither behaved "like a man of quality," nor a man of virtue," and whoever reads the trial will add, nor like a lawyer, for clearly lord *Cobham's* confession was not legal evidence, and sir *Edward Coke's* language to the prisoner was unprovoked, yet mean, cruel, and vulgar. The humanity of lords *ELDEN* and *KILWARDEN*, who acted as attornies-general, in Great-Britain and Ireland, on the recent trials for treason, exhibits a contrast of conduct and manners that must do them honour with the latest posterity. Those respectable and learned advocates, like honorable men, drew their expositions of the law from pure principles, and legal information; principles which are found in the works of *Hale*, whose memory will live throughout the enlightened world, as long as the administration of pure justice shall exist; and of *Foster*, whose judicial character merits the highest eulogium; principles which no expediency can warp, and which no power can abuse with impunity.

Rule the Sixth.

The confession of a prisoner, taken on examinations by a magistrate on an information, and reduced into writing, cannot be given in evidence until its identity be proved. 1 *Hale P. C.* 284.

Rule the Seventh.

And on the principle, that "the best evidence the nature of the case afford," is the only evidence that can be received, the proof of such examinations of the prisoner must be made either by the justice of the peace, or the coroner who took them, or the clerk who wrote them down, that they are the true substance of what the prisoner confessed. *Ibid.*

Rule the Eighth.

And before such examinations can be read in evidence, it must also be testified, that they were made freely,
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without

without any menace or terror, or any species of undue influence imposed upon the prisoner. *Hale P. C.* 284.

HALE gives the reason—"I have often known," says that venerable and benevolent judge, "the prisoner disown his confession upon his examination before the justice, and be sometimes acquitted against such his confession." *Ibid.*

Rule the Ninth.

But a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope or the torture of fear, comes in so questionable a shape, when it is considered as evidence of guilt, that no credit ought to be given to it, and therefore it is rejected. *Warrickshall's case, Leach. Cr. ca. 2 Ed. 222. 3 Edit. 298.*

Therefore in THOMAS VAUGHAN's case, before the *admiralty sessions, November 1696, 8 Will. 3.* though his confession was given in evidence, yet it appearing, upon cross examination, to have been made the night he was taken, and when very drunk, the fact of his birth in Ireland being absolutely denied by him the next morning upon his examination taken before a magistrate, little regard seems to have been paid to his confession. *5 St. Tr. 17. 2 Salk. 634. Foster 240.*

These rules reflect the brightest lustre on the principles of the English law, which benignly considers, that the human mind, under the pressure of calamity, is easily seduced, and liable in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail: and therefore a confession; whether made upon an official examination, or in discourse with private persons, which is obtained from a defendant by the impression of hope or fear, however slight the emotion may be implanted, is not admissible evidence. For the law will not suffer a prisoner to be
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made the deluded instrument of his own conviction. *Gilb. Evid. by Loft*, 137.

The wisdom of this doctrine was fully illustrated in a case at *Gloucester*. Three men were tried for the murder of Mr. *Harrison*, at *Cambden*, and one of them, under a promise of pardon, confessed himself guilty of the fact. The confession therefore was not given against him, and a few years after it appeared that *Harrison* was alive. *MS. note cited in Leach's Cr. Ca. 2 Edit. 223. 3 Edit. 298.*

The same rule and the same merciful construction thereon prevailed in Ireland. In *Spring assizes, Mullingar, April 1800*, WILLIAM BELL was tried on an indictment for robbing the mail. On being apprehended, Mr. *Tighe*, his master, and also a magistrate, obtained a confession from him by menaces and promises. Mr. *Lill*, also a magistrate, went to the prisoner in gaol, where he signed a written confession. Mr. *Lill*, on the trial, candidly acknowledged that he believed the written confession, taken from the prisoner by him, was given in consequence of the impressions previously made on the prisoner's mind by Mr. *Tighe*, and therefore lords KILWARDIN and CARLETON, Chief Justices, refused to receive it. *MS.*

Mr. CAPEL LOFT, the learned editor and amplifier of the last edition of "GILBERT'S Law of Evidence," in his reading upon the authorities cited from HALE, gives a caution worthy the attention of the minor magistrates. It appears therefore, says Mr. LOFT, that if any of the requisite circumstances are wanting, this species of proof (CONFESSION) will be rejected; and on the last circuit, sir GEORGE NARES even went further, he, though sinking under his illness, exerted his accustomed vigilance and benevolence, in the case where the admissibility of a confession in writing was rendered doubtful, by circumstances at the time of making it. If practicable, it may seem always best where the confession of the prisoner is taken, that it be in the presence of one or more indifferent persons unconnected with the *prosecutor*, the *magistrate*, or the *prisoner*, or at least the two former,

that it may be proveable to have been deliberately and freely made. *Loft in his ed. of Gilb. Evid.* 216.

It is scarcely possible for any man who has attended the courts of justice in Ireland, not to recollect, on reading the above eulogium on sir WILLIAM NARES, the truly constitutional and uniformly humane conduct of Mr. KELLY, while the bench was honoured by his filling a judicial seat upon it.

The truth of this reason given by HALE and the other authorities above cited, was repeatedly evinced upon trials on the circuits for treason, for administering unlawful oaths, and for other offences, connected with the rebellion in Ireland, in 1798. And experience, resulting from those trials, incontestibly proves, that confessions extorted from the fear of death, the infliction of torture, the hope of reward, or impunity for offences committed, so far from accelerating and clearing, impedes and fouls the current of justice, by often causing the acquittal, not only of the accuser by confession, but of those whom he accuses in the first instance before the magistrate, to save himself. A witness so circumstanced, when he appears to give evidence for the crown, often denies what he has sworn as an informer before the justice, or makes such excuses for swearing, or prevaricates, or conducts himself in such a questionable manner, as to destroy his credit with the jury. If he has sworn falsely before the magistrate, under the impression of terror, or hope of pardon, it has frequently happened, that the solemnity of the court, and the appearance of the prisoner whom he has injured, awes his mind into a recantation of his confession and extracts the truth. He feels himself on the verge of committing murder—and the accusations of his conscience palsying his heart, renders him a coward in villainy. Witnesses, however, who have sworn truly in their examinations before the magistrate, and falsely before the jury, have in several instances become the dupes of their own wickedness. For, though the prisoner has been acquitted by the false swearing of the witness, the witness has been afterwards put on his trial, convicted and hanged, or transported,

transported, or sentenced to the penalties annexed to the crime of perjury.

Rule the Tenth.

It has been determined, that where the accused makes a confession in conversation, and afterwards makes another confession before a magistrate, acting judicially, by taking down the same in writing, the conversation or parol confession may be given in evidence.

As in the *KING, v. CARTY*, at a *commission of Oyer and Terminer, &c. Dublin, October 1797*, 37 *Geo.* 3.

The prisoner was tried before BOYD and DOWNES, justices, B. R. on an indictment on *statute (Irish)* 36 *Geo.* 3. *ca.* 27. for that he with several others named, "Did conspire, confederate, and agree together, &c. wilfully, feloniously, and of their malice premeditated, to kill and murder HENRY LAWES LUTTRELL, earl of CARHAMPTON."

Mac Nally, of counsel for the prisoner, objected to receiving parol evidence of a private conversation between earl *Carhampton*, the prosecutor, and the prisoner, after he was committed to gaol. The objection was founded on this material fact, that a declaration or confession of the prisoner, had been taken as an examination in writing by a magistrate, and that being evidence of a higher nature than a confession by parol, and being the best evidence the nature of the case admitted of, was the only evidence could be given.

Lord *Carhampton* answered, he could positively swear that there was no certain information given by the prisoner, or even in contemplation, at the time of the conversation he was about to give in evidence.

The *counsel* replied, that if a confession or examination of the prisoner respecting the offence charged upon him and then in issue, was at any time taken down in writing by a magistrate, parol testimony could not be legally received; for such evidence solemnly written and judicially taken, was, if returned by the magistrate, of authority next to the records of the court, and excluded parol evidence of the prisoner's acknowledgments altogether;

altogether; and if those examinations were not returned, then the law implied that they were kept back, because, if produced, they would serve the prisoner.

Lord *Carbampton* was then examined by the *attorney-general* to the particular points which gave rise to the objection, and in his answers stated, that he knew an information or confession in writing had been made or given by the prisoner, upon the subject matter then examining into—that it was not taken by him, but given before a magistrate in his presence, about a fortnight after the prisoner was committed—and he believed it was in existence; but, the conversation he had with the prisoner, happened about a fortnight previous to the taking of the written information or confession.

The *counsel* persevered in his objection, which he urged was this—It was now in evidence that there had been a conversation between the prisoner and the prosecutor, respecting the charge now before the court. Subsequent to this there was a confession in writing by the prisoner, or an examination taken by the magistrate, pursuant to the statute of *Charles 1. ca. 10.* acting in his judicial situation, and by him taken down in writing, in the presence of lord *Carbampton*. Lord *Carbampton* had heard all that was communicated by parole, and offered evidence from memory, such evidence might err—written evidence could not; and therefore it was the only proper evidence of confession, proper to be brought forward in the case.

Downs, J. The objection is simply this—lord *Carbampton's* evidence is offered to prove a fact happening upon a particular day, namely, a conversation with the prisoner. Then, the objection is, that something happened afterwards which made the conversation not evidence.

Boyd, justice,—“We have no doubt; Mr. attorney-general go on with the evidence.” Of course the parole testimony was received. *Ridgerway's Rep. Carty's Tr. 73, and MS. note.*

Rule the Eleventh.

Confessions are received in evidence or rejected as inadmissible, under a consideration whether they are or are not intitled to credit. *Leach. Cr. ca. 222.*

In the *KING, v. WARRICKSHALL, Old Bailey sessions, April 1783*, the above rule was laid down by EYRE, chief baron, as resulting from legal principle; wherefore, as he said, it is a mistaken notion, that the evidence of *confessions* and *facts*, which have been obtained from prisoners by *promises* or *threats*, is to be rejected from a regard to public faith. No such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice, as it is repugnant to the general principles of criminal law. For confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit. *Leach. Cr. ca. 2 Ed. 222. 3 Ed. 298. Ante 42.*

Rule the Twelfth.

The confession of a prisoner taken upon *oath*, cannot be read in evidence against him. *Bull. N. P. 242. Vide stat. Phil and Mary, ante*

Of course, no prisoner brought before a magistrate ought to be sworn. The reasons of this restriction results from the most obvious principles of justice, policy, and humanity.

Rule the Thirteenth.

Though a confession obtained under the impression of fear, or hope of pardon, or taken upon the oath of the defendant, cannot be given in evidence; yet, if any facts arise in consequence of such a confession, they may be given in evidence, and it can never go to the rejection of evidence by witnesses discovered in consequence of the confession.

This rule was solemnly laid down as law, in the *KING, v. WARRICKSHALL*, above cited. EYRE, C. B. stating

as undoubted law, that any facts which may arise in consequence of even such confessions may be given in evidence; because, FACTS must be ever immutable—the same whether the confession which discloses them be true or false, and justice cannot suffer by their admission. *Leach. Cr. ca. 2 Ed. 222. 3 Ed. 298.*

Therefore in DOROTHY MOZY's case, indicted on the 10 and 11 Will. 3. ca. 3. for shop-lifting, *Old-Bailey, February 1784.* Evidence was received of goods found, in consequence of a confession made by her. And,

BULLER, J. and PERRY, B. held, that whatever ACTS are done, are evidence; but if those acts are not sufficient to make out the charge against the prisoner, the conversation or confession of the prisoner cannot be received, so as to couple it with those acts, in order to make out the subject matter of proof.

BULLER, said, "On the authority of a case decided by all the JUDGES, that though confessions improperly obtained, cannot be received in evidence, yet the acts done afterwards may be given in evidence, though they were done in consequence of the confession." *Leach. Cr. ca. 2 Edit. 224. 3 Edit. 301.*

So in LOCKHART's case, *Old-Bailey, June 1785.* The prisoner made a full confession, by which it was discovered, that part of the property stolen had been disposed of to a Mr. Grant; and Mr. Grant was called by the counsel for the crown to identify the property. The confession had been obtained by such promises of favour as rendered it inadmissible evidence: and it was contended, that as the discovery of Mr. Grant resulted from the illegal confession, which had been obtained from the prisoner, he, Mr. Grant, was not a competent witness. But the court said the law was clearly settled, that although a confession improperly obtained cannot be given in evidence, yet it can never go to the rejection of the evidence of the other witnesses, which are got in consequence of such confession. *Leach. Cr. ca. 2 Edit. 300. 3 Edit. 430.*

And in the KING, v. BUTCHER, *Maidstone, Summer assizes, 1798.* It was held, that so much of the confession as related strictly to the fact discovered by it may be

be given in evidence; for the reason of rejecting extorted confessions, is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shews, that so much of the confession as immediately relates to it is true. *Leach. Cr. ca. 3 Edit. 301.*

Rule the Fourteenth.

Parol evidence cannot be received of the examination of a prisoner taken before a magistrate, unless it be clearly proved, that in fact, such examination never was reduced to writing.

As in the *KING, v. JOHN JACOBS, SAMUEL SELSHIRE, and RICHARD M'DONALD*, tried before *GOULD, J.* for a highway robbery, *Old-Bailey, sessions, February 1784, 28 Geo. 3.*

It appeared, that when the prisoners were carried before a justice of the peace, *Samuel Selshire* was admitted to give evidence against *Jacobs* and *M'Donald*, and that they all made a full confession of their guilt; but it did NOT appear that either the information of *Selshire*, or the confession of the other two prisoners had been taken down in writing.

The prosecutor attempted to give *viva voce* testimony of their confessions.

REYNOLDS, clerk of the arraigns said, it had been the constant practice of the court, that when the justice has neglected to take a written examination, parol testimony of confession may be admitted; but that if he has reduced such examination into writing, no other evidence of it could be received.

COURT. The legislature, by the *statutes 1 and 2 Phil. and Mary, ca. 13. sect. 4. and 2 and 3 Phil. and Mary, ca. 10.* has ordered, "That justices of peace, when any
" prisoner is brought before them on a charge of felony, SHALL take the examination of the said prisoner,
" and the information of them that bring him, of the
" fact and circumstances thereof; and the same, or as
" much thereof as may be necessary to prove the felony,
" SHALL be put in writing, within two days after the
" examination,

mission of Oyer and Terminer, Dublin, July 1806.
40 Geo. 3.

Rule the Sixteenth.

But a confession, whether in writing, or by parol, does not amount to a conviction until the party has pleaded not guilty in open court: for the trial of the confession must be by the petit jury. *Gilb. Evid. by Loft, 137.*

Rule the Seventeenth.

Wherever a man's confession is made use of against him, it must all be taken together and not by parcels.

For as was laid down in the *KING, v. PAINE*, if such confession shall be taken as evidence to convict a man, it is but justice and reason, and so allowed by the civil law, that his whole confession shall be evidence as well for as against him. 5 *Mod.* 165. before cited. *ante*.

And as to the contrary decision in *THROCKMORTON'S* case, it is against law, justice, mercy, and reason. 1 *St. Tr.* 63.

Rule the Eighteenth.

As the statutes of *Philip and Mary* positively enact, that the justices of the peace *shall take* the examination of the prisoner, and reduce the same into writing, the court will presume that the confession of a prisoner was reduced into writing; for the law presumes that the magistrate does his duty, until the contrary be proved. *Leach. Cr. cases, 2 Ed.* 185. 3 *Ed.* 240. *Post*.
Vide ante the *KING, v. HALL.* 51.

CHAPTER VII.

Of persons immediately interested in the event of the prosecution, and legal objections affecting their competency.

Rule the First.

HAWKINS considers it a general and established rule, that in all cases whatsoever, a person who is either
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to be a GAINER or a LOSER, in the event of the cause in which he is called to give evidence, whether the advantage, or disadvantage, be direct and immediate, or consequential only, is incompetent, and cannot be examined. 2 *Hawk. Pl. Cr.* 46. *Co. Litt.* 6. 1 *Siderf.* 237. 1 *Keb.* 836.

HALE doth not state this rule so strongly nor so generally as HAWKINS. He says, a man, in point of *interest*, is not a lawful accuser or witness in *many* cases. *Vide rule 6. Post.*

This rule, though universal in civil matters, does not exclude the party who prosecutes in the name of the crown, in the right and in behalf of the public; for this, in ordinary cases of personal wrong there is an obvious reason; since he doth not come for personal compensation in the shape of *damages*, which are recoverable only by civil action; nor is he by intendment of law presumed to come for private revenge in the punishment of the offender; but in pure maintenance of the laws and public justice. *Gilb. Evid. by Loft*, 221.

However the principle is yet more general; for not to mention *appeals of murder*, which perhaps with legal propriety may be classed under this head, since the law will not presume an interest in the indulgence of an acrimonial and unsocial passion such as revenge is, a party shall prosecute by indictment where he hath a direct interest in the event, that is, where he hath been *robbed*, and the goods are out of his possession, remaining in the hands of the party charged. And here, if he *prosecutes to conviction*, he shall have, by the statute, a writ of restitution. Nay, he shall often be without recovery of his goods, unless he prosecutes; for, he shall not have trover or other civil action against the felon, for the trespass mergeth in the felony. *Gilb. Evid. by Loft*, 222.

The true and most general principle therefore, which governeth this distinction is, that it concerneth the community, that crimes pass not wholly unpunished, and if the party suffering might not prosecute, few beside might have the certain knowledge of the fact, or the disposi-
tion

tion of bringing it to trial, which must combine to call forth the exertions of public justice. *Gilb. Rep.* 113.

NOTE. By the common law there was no restitution of goods upon an indictment, because it is at the suit of the king only, and therefore the party was obliged to bring an appeal of robbery, in order to have his goods again; but by statute on a conviction of larceny particularly, the prosecutor shall have his goods restored. *Stat. 21 Hen. 8. ca. 11. Irish. 28 Hen. 8. ca. 10. 1 Stat. at large* 101. *3 Inst.* 242. *4 Comment.* 355, 356.

And for the reason given above, a party may be a witness where there is a fine to the king, no private advantage arising to the witness immediately or consequentially, from the prosecution; but if there be any advantage of private benefit to accrue by the prosecution, the party is equally excluded as in a private action. *Gilb. Evid. by Loft* 232.

So in an indictment or information of assault and battery, the person injured may be a witness, because here the fine is to the king, and no private benefit accrues to the party from the success of the prosecution. *Ibid. Hardr.* 331.

Yet such verdict in an information, founded only on the party's own oath, cannot be given in evidence in a civil action, for that were indirectly to suffer the party to attest in his own behalf. *Gilb. Law of Evid. by Loft*, 232.

But though, in criminal cases, the exceptions are few, in which a party *interested* in the event, may not be a witness; yet in civil cases there is hardly at common law an instance, where the cause is so circumstanced, as that he may, and this upon clear reasons operating to such exclusion. *Vide the next chapter.*

Rule the Second.

Yet so far the rule holds, being founded on a principle not to be superceded of necessary justice; that where a person is to *discharge* himself by such evidence as would effect a conviction of the party on his trial, he shall not be

be admitted to give evidence in support of a public prosecution. *Bull, N. P.* 288, 289.

For, says GILBERT, C. B. where a man who is interested in the matter in question, would also prove it, it rather is a ground for distrust than any just cause of belief: for men are generally so short-sighted, as to look to their own private benefit, which is near them, rather than to the good of the world, which is more remote. Therefore, from the nature of human passions and actions, there is more reason to distrust such a biased testimony than to believe it. It is also easy for persons who are prejudiced and prepossessed, to put false and unequal glosses upon what they give in evidence, and therefore the law removes them from testimony, to prevent their sliding into perjury: and it can be no injury to truth to remove those from the jury, whose testimony may hurt themselves, and can never induce any rational belief. *Gilb. Evid. by Loft* 223.

Rule the Third.

On the principle of the first general rule, if a *defendant* is to be examined on the part of the crown, the attorney-general must first enter *noli prosequi*.

As in *WARD, v. MAN*, 8 December 1741: Lord HARDWICKE said, in crown prosecutions, no defendant can be examined in behalf even of the king, but the attorney-general, at the bar, enters a *noli prosequi* against that particular defendant before he can be admitted as a witness; and this was done in a case by *Trevor*, when attorney-general, who was afterwards lord chief justice of the common pleas. 2 *Atk.* 229.

So in the *KING, v. ELLIS, BLAKE* and others, sittings after Hilary, 1802. Defendants were indicted for a conspiracy to persuade a witness to absent himself from the trial of a person charged with uttering base money, knowing it to be counterfeited.

The attorney-general (*Law*) entered a *nol. prof.* in regard to two defendants, who were examined as witnesses for the crown, and on their evidence the other defendants were found *guilty*. *MS.*

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This act of the prerogative has however been seldom exercised. A witness so circumstanced, though competent, would appear in a very questionable shape; for his credit would be liable to every impeachment, by which the testimony of an *approver*, or an *accomplice*, could be weakened upon a cross examination.

Rule the Fourth.

In criminal prosecutions, where there are several defendants on trial, and it appears, on closing the evidence on the part of the crown, that against one or more of them no evidence has been given, the court will, in its discretion, direct an issue to go up to the jury, on the part of the defendant or defendants, against whom *no* evidence had appeared; and on a verdict of not guilty being recorded, will suffer such defendant or defendants so acquitted, to give evidence on the part of the prisoner or prisoners remaining at the bar on trial.

As in the KING, *v.* captain SIMON FRAZER, and ROSS, a soldier, for the murder of CHRISTOPHER DIXON, *Summer assizes, county of Kildare, at Athy, 1797.*

Espinasse, of counsel for the prisoners, moved, on the closing of the evidence, that a separate issue should be sent up to the jury, suggesting that no evidence had appeared against the prisoner *Frazer*, that could support the charge in the indictment.

Mac Nally for the crown, objected. He would not say that the court had not a discretionary authority to send up such an issue, but in this case the circumstances did not warrant the motion. The homicide had been clearly proved, and no provocation of any kind had been set up in justification—there was evidence to go to the jury against both prisoners, and the jury would determine to what degree of atrocity. A mortal weapon had been used, a dirk or dagger—no fact appeared to shew that the death was the consequence of self-defence, or occasioned by accident, or by misfortune—as to justifiable homicide that was out of the case, for no homicide is justifiable that is not sanctioned by the express letter of the law, such as the executioner putting the convict

to death, by legal warrant ; and the slightest evidence of homicide of any species, not justifiable, was a bar to the indulgence claimed by the prisoner from the court. If the court concluded on the perfect innocence of *Frazer*, it would be assuming to itself the peculiar province of the jury, who were the only constitutional judges of facts and of credit, and who alone, in this as in other cases, had a right to decide on the facts that had been given in evidence, and the credit of the witnesses.

Espinasse answered, that at an assizes held at Naas, an officer and serjeant were tried before Mr. Justice KELLY, for the murder of a prisoner, who had attempted to escape from their custody at Leixlip. That it was argued on that occasion by the counsel for the crown, that a separate issue should not be sent up to the jury for the serjeant ; but the court was pleased to over-rule the objection ; the issue was accordingly sent up, the serjeant was acquitted, and immediately admitted an evidence for the officer.

Mac Nally in reply. Every decision by such a judge as Mr. Justice KELLY, must have weight ; but here the decision is given without any statement of the facts, or the reasons which induced that truly constitutional, impartial and humane judge, to exercise his discretion in favour of the prisoner, against whom, most probably, there was not a scintilla of evidence. But here, whatever may be the feeling of the court, or of the jury, it cannot be said that there is no evidence of unjustifiable homicide. Here it appeared, by incontrovertible evidence, that the prisoners *Frazer* and *Ross* were countrymen, master and serjeant, officer and soldier, in the same Scotch regiment. That when the deceased was taken into custody for being out late, he was repeatedly struck. That *Frazer* ordered the deceased to get behind him, which he refusing, *Frazer* struck him on the cheek, and the blow was not returned ; and he went behind *Ross*. It was true he leaped off the horse ; it was true he ran away—but it was proved he was followed by *Ross*, who was followed by *Frazer*, both having swords, the deceased unarmed. It was proved he was killed,

and by the hand of *Ross*, for it was proved that *Frazer* said so. Was it denied that he was found weltering in blood, bleeding from his breast and from his face; was it not admitted that no serious provocation was given? did he die by a single blow? no, the surgeon swore one wound penetrated the liver and entered the stomach—it was a mortal wound; another was on his chest, it was superficial; a third was in his back, and it passed through the shoulder blade—it was mortal! a fourth, and a mortal wound too, penetrated the belly: he was cut on the nose; the end of the nose was separated, the jaw was cut through, it was a cut—not a stab—and there were no wounds on his hands, which shewed he had not struggled with, nor griped the dirk. Now, what is the excuse? one witness says, he believes it was the duty of officers to take up persons walking out at the hour *Dixon* was from home; and, that the county was out of the peace. If this be not evidence of wilful and malicious murder, murder is unknown to the law of Ireland. Yet, it is said, there is no evidence of manslaughter, or any other species of homicide, proper to be left to the jury against *Frazer*. If his innocence be so apparent, why has his counsel called witnesses on his part, and thereby put his innocence in issue? would they have done so if they could have depended on the *ex parte* evidence and their own cross examination of the witnesses for the prosecution. Suppose the judge submitted to the motion pressed upon him, and the jury should bring in a verdict of manslaughter, would not that stigmatize Captain *Frazer* with felony? it would be convicting him of a crime which in contemplation of law renders the delinquent infamous, shuts up his mouth from giving evidence, and brands him with incompetency. Would the court, in that case, postpone the trial of the prisoner *Ross*, until the prisoner *Frazer* was purged of his incapacities, by pleading the benefit of clergy in bar of execution? would the court wait until the record of his offence was stamped upon his hand, by burning with a hot iron? or would the court wait until the king's pardon could be procured to remit the infamy of branding, and thereby restore the competency?

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To do the first, could not be presumed, because the history of the Pleas of the Crown cannot shew a precedent—the second would be impossible, because the prisoner being in charge, the court could not indulge him by adjourning the trial until such pardon should be procured.

TOLER, solicitor-general, (who sat as judge) said, he did not consider that granting the motion was a favour to captain *Frazer*, therefore would not hesitate to send up an issue to the jury on the charge against him. The issue was accordingly sent up, and the jury bringing in a verdict of not guilty; *Frazer* was sworn, and *Ross* was also acquitted.

Rule the Fifth.

As no person is a competent witness who is a gainer or loser by the event of the cause; so a person who is bail for the defendant, cannot be a witness for him without consent.

As in the KING, v. JOHN HAMPDEN, *misdemeanor*, *Hilary*, 36 Car. 2. 1683. B. R. Sir Henry Hobart being called as a witness for the defendant, sir Robert Sawyer, attorney-general, opposed his being sworn, on the ground that he was one of the defendant's bail; and,

Sir GEORGE JEFFERIES, C. J. said, if he be one of his bail he shall appear in this court the first day of this term, and so from day to day until he shall be discharged; and remains under that recognizance; then, in any case against him he cannot be a witness for him: for, in every ordinary case, it is every day's practice to deny bail to be witnesses: but when the bail is discharged, and the prisoner rendered in custody, then he may be a witness. And he admitted that the bail might be changed in order to make him a witness: but the attorney-general consenting that sir Henry Hobart might be examined, he was sworn. 3 St. Tr. 842.

In civil cases the reason of the rule is, because the bail are directly interested; for if a verdict be against the principal, the bail become immediately answerable; and this applies to cases of *misdemeanor*, where the principal appears by attorney, and has it in his power to

abscond on conviction to avoid sentence, by which the recognizance of bail would be estreated.

So in *HOPKINS, v. NEAL and NEWMAN*, *Hil. 9 Geo. 2. B. R.* where the plaintiff sued as an INFANT by her father, the *prochein amy*, for an assault and battery; the father was refused to be a witness by lord HARDWICKE, at *Nisi Prius*, he being liable to costs. 2 *Stra.* 1026.

Rule the Sixth,

In informations before magistrates on penal statutes, where the informer is intitled to the whole, or part of the penalty, he is an incompetent witness; (unless made competent by statute) for he is directly interested in the event. *The King, v. Tilly.* 1 *Stra.* 316.

Rule the Seventh.

In an indictment or information on the statute of usury, the party to the usurious contract cannot be a witness while he hath an interest in the question, because that were to avoid his own securities: but after he hath paid the money he is a good witness; because then the party guilty is fined to the king, and there is no advantage to the prosecutor from the information. *Co. Litt. 6. b.* 2 *Roll. Abr.* 689. 1 *Hale, P. C.* 202, 203. *ante* . *Abraham's qui tam, v. Bunn. Post* .

BULLER, to the same point says, in an indictment for perjury on the statute, the person injured cannot be a witness, because the statute gives him ten pounds, but in an indictment at common law, the party injured may be a witness. 2 *Hawk. P. C. ca.* 46. *Bull. Nisi Pri.* 289.

Rule the Eighth.

But by statute, the inhabitants of any place or parish are good witnesses, notwithstanding the penalty to be given to the poor, or otherwise, for the benefit of the parish or place; provided the penalty doth not exceed twenty pounds. *Stat. 27 Geo. 3. ca.* 29.

Rule

Rule the Ninth.

Also the inhabitants of a county may be examined as witnesses on indictments for not repairing county bridges. *Stat. 1 Ann. ca. 18.*

Rule the Tenth.

In actions brought on the *statute of Winton*, 13 *Edw. 1. st. 2. ca. 1.* which gives an action against the hundred in cases of hue and cry, in cases of robbery, persons inhabiting within the hundred may be witnesses. *Stat. 8 Geo. 12. ca. 16.*

Rule the Eleventh.

So where rewards are given by statute, for apprehending or convicting persons charged with particular offences, as robbery on the highway, burglary, &c. the persons apprehending and prosecuting with a view to those rewards are competent witnesses. *Stats. 3 and 4 Will. 3. ca. 8. 5 Ann. ca. 31.*

Rule the Twelfth.

So where a reward is offered by the royal proclamation, from the king in council, persons prosecuting in expectation of such reward are admissible.

So ruled at the *Old-Bailey, London*, and also at the sessions-house, *St. Margaret's-hill, Southwark*, on the trials of the rioters, 1780.

LORD GEORGE GORDON, on the 10th of *June*, 1780, commanded a numerous mob of fanatics, stiling themselves "*The Protestant Association*," in *St. George's-fields*, for the purpose, as they advertised the public, of obtaining the repeal of a statute, passed for the relief of his majesty's Roman catholic subjects. These zealots marched to the parliament-house in a body, attacked and assaulted many of the peers and commoners, burned chapels, broke open the public prisons, set fire to them, and discharged the felons and debtors; attacked the
bank,

bank, and destroyed several private houses, particularly those of lord *Mansfield*, Sir *George Saville*, and Mr. *Edmund Burke*. Rewards were offered for the apprehending and convicting of the offenders, and a great number of them having been taken, indicted and tried for various offences, according to their several cases, a question arose in court, "Whether persons expecting the reward offered, and being therefore interested in the conviction of the parties indicted, were admissible witnesses against them?"

The JUDGES were of opinion, that the testimony of witnesses who were intitled to, and claimed the reward, was admissible, notwithstanding that interest. Several cases were cited, particularly the cases of robbery and larceny, where not only restitution of stolen goods, but the claim and title to parliamentary reward depended on the conviction of the persons charged as offenders. So in the case of the bank, post-office, and other public places, prosecutors are intitled to rewards; and yet the expectation or title to those rewards had never been considered as creating such an interest in the witness as would destroy his competency. *MS. note of the case. Leach. Cr. ca. 2 Edit. 251. 3 Edit. 353. Onf. N. P. 251.*

So in the KING, v. JOHN LEARY, *commission of oyer and terminer, Dublin, December 1795. 26 Geo. 3.*

GEORGE, B. In summing up the evidence to the jury said, a witness is incompetent who is personally interested in any cause in which he is produced; and therefore where this interest consists of pecuniary consideration, or of any other kind, such as pardon for offences, it is a fit subject for the jury to consider. In civil cases clearly, if a witness be interested, he cannot be examined. But in criminal cases, for the safety of the public, getting reward does not in a court of criminal jurisdiction, disable a witness from giving testimony, though it may go to his credit. *Ridgeauy's rep. of the trial, 167. and MS.*

In the KING, v. DYLONE, *Trinity, 7 Geo. 3. Nisi Prius*. Indictment against a priest of the church of Rome, for assisting and celebrating mass. The prosecutor was produced as a witness; but objected to by the

the defendant, a reward being the right of any person who shall convict a popish bishop or priest of that offence.

LORD MANSFIELD over-ruled the objection; saying it was the constant practice to admit the prosecutors on an indictment for highway robbery, or burglary, &c. though they are intitled to a reward. *Onsl. N. P. 257. Esp. N. P. 713.*

CHAPTER VIII.

How far persons not professing the christian religion, and christians dissenting from the established mode of taking an oath, may be admitted to give evidence; and of objections to witnesses on other religious grounds.

Rule the First.

JEWS being sworn on the *old testament* to depose the truth, the whole truth, and nothing but the truth, are admissible witnesses.

HALE holds, that a *jew*, who only owns the old testament, is a competent witness: for although the regular oath, as it is allowed by the laws of England, is, *tactis sacrosanctis dei evangelis*, which supposes a man to be a *christian*, yet, in cases of necessity, as in foreign contracts, between merchant and merchant, which are many times transacted by *jewish* brokers, the testimony of a *jew tacto libro legis moysaicae*, is not to be rejected, and is used among all nations. 2 *Hale, P. C. 279. Omichund, v. Barker Atkyn 21. Post*

There is no case wherein a *jew* was sworn and examined as a witness until after the restoration. They were drove out of England by persecution in the 18th year of *Edw. 1.* and did not return until the usurpation of *Oliver Cromwell. 1 Atk. 31. Post*

Rule

Rule the Second.

On the ground of *necessity*, and *sound policy*, and *special circumstances*, a PAGAN OR INFIDEL, of any description whatsoever, sworn according to the ceremonies of the religion which he professes, is an admissible witness in a cause civil, or criminal.

COKE says, an *infidel* cannot be a witness; but HALE doubts whether it be essential to the credibility of an oath, that it should be taken upon the old or new testament; and observes, that if an infidel is not to be admitted as a witness, the consequence would be, that a jew, who owns the old testament, could not be a witness. *Co. Litt.* 6. 2 *Inst.* 479. 3 *Inst.* 165. 4 *Inst.* 279. *Flet. b.* 5 ca. 22. *Bract.* 116. 2 *Hale. P. C.* 279. *Ante* 2, 8.

The oath of idolatrous infidels have been admitted in the municipal laws of many kingdoms, especially *si juraverit per verum Deum creatorem*, and special are instituted in Spain, touching the forms of the oaths of infidels. *Vide Covarruvium. tom. 1. part. 1. De juramenti forma, p. 249. Antwerp 1614.* 2 *Hale, P. C.* 279.

And it were a very hard case, if a murder committed here in England, in the presence only of a turk or a jew, that owns not the christian religion, should be dispunishable, because such an oath should not be taken which the witness holds binding, and cannot swear otherwise, and possibly might think himself under no obligation, if sworn according to the usual stile of the courts in England. 2 *Hales, P. C.* 279.

But then it must be agreed, that the *credit* of such a testimony must be left to the jury. *Ibid.*

IN ORNYCHUND, v. BARKER, *chanc. Mich.* 1744, the law respecting the admissibility of pagans, &c. to give evidence was elaborately argued, and finally determined.

CASE.—Pursuant to an order of chancery, a commission went to the *East-Indies*, and the commissioners certified, that among other witnesses for the plaintiff, they had examined *Ramkessensent* and *Ramchurnecooborage*, and several other subjects to the great mogul, being persons
who

who profess the Gentou religion; and that they were solemnly sworn in the following manner, *viz.* "The
 " several persons being before us, with a Bramin priest
 " of the Gentou religion, the oath prescribed to be
 " taken by the witnesses was interpreted to each witness
 " respectively; after which they did severally, with
 " their hands, touch the foot of the Bramin priest of
 " the Gentou religion, being also before us, with another
 " Bramin or priest of the same religion; the oath
 " prescribed to be taken by the witnesses was interpreted
 " to him; after which *Neenderam Sunnah*, being
 " himself a priest, did touch the hand of the Bramin,
 " the same being the usual and most solemn form in
 " which oaths are most usually administered to witnesses
 " who profess the Gentou religion, and the same
 " manner in which oaths are usually administered to
 " such witnesses in the courts of justice erected by letters
 " patent of the late king at Calcutta."

The cause came on upon the merits, and the bill was brought to have a satisfaction for 67,955 rupees, amounting to about 7,600*l.* English money, from the estate of the late *Mr. Barker*, the father of the defendant.

Mr. Barker, in July 1729, being appointed by the East-India company chief of Patna, applied to the plaintiff, who was a considerable merchant, to be engaged in partnership with him in the sale of goods.

The plaintiff was to advance the money for buying the goods, and in consideration thereof *Barker* was to allow him interest upon a moiety of twelve *per cent.*

The goods were sold by *Barker* for a great profit, and the whole money received by him; but he refused to come to any account with the plaintiff, upon which he filed his bill in 1736, in the mayor's court, in Calcutta, and when the cause was ready for hearing there, *Barker* left Calcutta, and took his passage for Europe, and upon his withdrawing himself, the court at Calcutta interpreted it to be a flight from justice, and that he should pay plaintiff's demand in full and all his costs.

Barker died in the voyage; but by his will, charges his real and personal estate with the payment of his debts.

The end of the bill was, that all books and papers relating to the dealings between *Barker* and the plaintiff might be produced, and that the sum before mentioned might be paid with subsequent interest, and the costs in the mayor's court at Calcutta.

The attorney-general (sir *Dudley Ryder*) for the plaintiff, offered to read the deposition of *Ramkissenfest*, but the counsel for the defendant objecting to his being a proper witness. Lord HARDWICKE, chancellor, ordered the commission and the return to be read, and likewise the letters patent.

Atkyns argued in support of the objection. *First*, that as the law of England now stands, no oath can be administered to make a man a competent witness, but the oath upon the Evangelists. *Secondly*, that it would be contrary even to the rules of equity to admit any other.

He argued, that from the oldest authorities extant, down to the present time, the rule has been uniform and invariable, as to the particular oath required; and to shew that so long ago as *Edw. 1.* time, at least four hundred years, the general definition of an oath was, "affirming or denying a thing, with a solemn appeal to the sacred writings for the truth of what he said," he cited. *Fleta lib. 5. ca. 22. p. 344. Bract. 116. Britt. ca. 53. p. 135. Fortesc. de Laud. Leg. Ang. ca. 26. p. 58. Co. 2 Inst. 479. 3 Inst. 165. 4 Inst. 279, and stat. 21 Hen. 8. ca. 16. Ante 8.*

From these authorities he concluded, that natural-born subjects, aliens and strangers, without reservation of any form or ceremony in their own religion, relating to oaths, are directed to take the oath upon the holy evangelists; so that (alluding to *stat. 21 Hen. 8.*) the legislature governed themselves by the law as it then stood, and saw no reason to alter it for the private convenience of particular persons.

He submitted, that the persons offered as witnesses, were not capable of taking an oath, as the law of England conceives it. History represented the Gentous as ignorant in their notions of religion, absurd and ridiculous, and in their ideas of the Deity gross. How then can they be said to perform such a ceremony with a sacred

sacred and religious mind, which the word *sacramentum* implies? *Ante* 8.

To support this, he stated the ceremony set forth in the certificate of the commissioners, which could not be said *Deum in testem vocare*, nor *actus divini cultus*. So far from being accompanied with fear, or the worship of God, as an oath in our law ought to be, it was meanly prostrating the body at the foot of a priest, and calling upon the *creature* instead of the *creator*.

As to latter opinions, *Hawkins* says, it seems to be agreed to be a good exception, that a witness is an infidel, that is, that he believes neither the old nor new testament to be the word of God, on one of which the law requires the oath should be administered. *Hawk. ca. Evidence.*

He then quoted sir MATTHEW HALE, anticipating that his opinion would be used against him, but contending it was in his favour. 2 *Hale, P. C.* 279. *Ante* *Ca.* 1 and 2.

He denied the consequence drawn by *Hale* from *Coke's* position, that an infidel cannot be a witness, therefore a jew cannot be one; for they believe a God just in the same manner as the christians do; and the old testament is as much the *evangelium* to them, as the new is to us; and therefore widely different from the infidel, who has no notion of the true God.

In *ROBEELY, v. LANGSTON*, this was the very reason for admitting the evidence of the jews. *KEELING* swore jews on the old testament; and it was held to be an oath, on which by the *stat. of Eliz.* there might be an assignment of perjury; for it is within the general words of *sacra sancta evangelia*; so of the common prayer book that hath the epistles and gospels; but *query* of a psalm book only. 2 *Roll.* 314.

On this ground the court formed their opinion, and not upon a consideration of their being brokers in foreign contracts between merchant and merchant.

Hale does not positively say, that by the laws of England a person who owns not the christian religion, may be examined according to the form of his own religion; but, is only commending the municipal laws of other

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kingdoms, and throws it out rather as a *wish*, that the rule were to prevail here in cases of *necessity*, than as his *opinion*: therefore the utmost can be collected from what he says is, that he thought it a defect in our law. And though his genius and knowledge were equal perhaps to any one man of the profession, yet in the other scale may be put the wisdom and experience of the great and eminent persons, who for ages before his time have adhered to the form of an oath, as a constant and invariable rule.

Besides, the present cannot be called a case of *necessity*, because there are persons in India privy to all these transactions, who are under no objection, as to their capacity, of taking an oath; but the plaintiff knew that natives of the same country, engaged in the same interest, and the same business with themselves, were much more inclinable to swear for them.

The legislature only can dispense with the common and usual form of oaths, and that is the case of the quakers, who are relieved by *stat. 7 and 8 Will. 3. ca. 34. sect. 1. Post*.

If the law of England, with regard to the form of an oath was so strict, that the judges did not think themselves justified in admitting the most solemn affirmations and declarations of the quakers instead of the oath, though in favour of persons who agreed in the substantial and fundamental part of the christian religion with the church of England, where is the reason for admitting infidels and idolaters?

Second point. It would be contrary to the rules of equity to admit this evidence. It would give rise to hardships and inconveniencies to the defendant. It would bring him into court on unequal terms. One manifest advantage to the plaintiff would be, that notwithstanding his witnesses should assert the grossest falsehoods, and be guilty of the most notorious perjury, yet the defendants would be without remedy, for *no indictment* could be supported against them, it being a material ingredient in indictments of this kind, that *tacito per se sacro evangelio voluntarie et corrupte commissit perjuriam*; and that omitting these words would be fatal error; for it

it will not be sufficient to say, that *touching the foot of the priest with his right hand, voluntarie et corrupte commissit perjuriam.*

Attorney-general (sir Dudley Ryder) for the plaintiff.

First, The matters in question are matters of *commerce* arising in a foreign country, in a foreign jurisdiction, between a christian and an infidel. *Secondly*, In this country the Gentou religion prevailed; and Calcutta is only a factory within this country. *Thirdly*, The witnesses do *believe in a DEITY*. *Fourthly*, They not only believe in a DEITY, but in swearing they use an expression equivalent to ours, *So help me GOD*. *Fifthly*, Solemn oaths to attest facts, are usual amongst them. *Sixthly*, They understand an oath in the same manner we do. *Seventhly*, By the letters patent establishing a court at Calcutta, there is the strongest reason to admit their evidence. *Eighthly*, In point of fact, Gentous are admitted as witnesses in the court of Calcutta. *Ninthly*, The manner made use of in the present cause, is the most solemn and customary. *Tenthly*, These witnesses are all of the Gentou religion.

He then submitted, whether a person of such a religion and an infidel, may be admitted as a witness; and made two propositions. *First*, That the witness is capable of taking an oath as an infidel. *Secondly*, That there is nothing in our law that prevents him from being a witness.

An infidel properly defined is a deist, that does not believe in the Christian religion. All that in point of nature and reason is necessary to qualify a person for swearing, is the belief of a God, and an imprecation of the divine being upon him if he swears falsely. This is the sense of all civilized nations, the foundation of all treaties; *nullum erim vinculum ad astringendam fidem jurejurando majores arcius esse voluerint*. Lib. tert. M. T. li. de Offic. sec. 31.

The best writers on christian morality have gone so far as to admit the oath to false gods. It is the sense of *Grotius*. Lib. 2. ca. 13. f. 12.

Nothing is proper to the oath here, but *so help me GOD*; when it comes to the corporal part it is *supra sanctum*

sanctum evangelium, which is a mere ceremony and not essential.

The jewish religion and the old patriarchs considered the heathens capable of an oath. The instance of *Isaac* and *Abimelech* swearing to one another. *Jacob* swears by the fear of his father *Isaac*, and accepted of *Laban's* oath without hesitation, though he swore by false gods. *Genes. ca. 26. v. 31. Ca. 3. v. 53.*

Consider the circumstances and situation of the Gentous with respect to the oath they have taken. *First*, As to the form of the oath; and then as to the corporal parts. As to the form of the words; it is the same we make use of here, for the interrogatory, *Do you believe in the supreme Being*, &c. is read over and interpreted to him, and he takes it in the same sense as other people do, which will put an end to the whole objection. As to the corporal part, at least it shews humility, and is in all respects applicable to the kissing of the book, and equally significant, for both are no more than signs, and not material to the oath.

Grotius shews, there is more than one form of oath: a greater authority, our SAVIOUR says in *Matthew's* gospel, *who swears by the Temple, swears by the GOD who inhabits it.* So that all terminates in a solemn appeal to the DEITY for the truth of what he says. There are passages in *Livy*, *Polybius* and *Grotius*, which shew that oaths are arbitrary; and the consequence must be, that an infidel is capable of an oath.

Secondly, Whether there is any thing in the law of England that impugns it?

COKE says, an infidel cannot be a witness: but though that may be a general rule, does it follow that there shall be no exception? does not our law say, *exceptio probat regulam*? Certainly, there should be general rules relative to evidence, but if exceptions were not allowed, it would be better to demolish all the general rules. There is no general rule without exception but this, that the best evidence shall be admitted which the nature of the case will afford.

Rules as general as this are broke in upon for the sake of allowing evidence. No rule more binding than that a man shall not be admitted an evidence in his own case; and

and yet the statute of hue and cry is an exception. A man's books are allowed to be evidence, or which is in substance the same, his servants' books, because the nature of the case requires it. A wife cannot be a witness against her husband, has been broke in upon in cases of treason. So a man may be examined without oath; for the last dying words of a man are given in evidence in the case of murder. A child may be examined without oath, but if capable of considering the obligation of an oath, may be sworn. The court denied the last exception to be law. *Vide Post. ca. "Husband & Wife;" "Infant, &c."*

Admitting a jew to be sworn is an exception to the general rule. What is the definition of an infidel? why one who does not believe in the christian religion. Then a jew is an infidel, for the sense of *evangelium* has been perverted, and ought not to be confined to the new testament only, for it is used by our SAVIOUR as good tidings, in opposition to the bondage the jews then underwent, and was delivered to them first.

As to the passages in *Deuteronomy*, the books of *Moses* are no part of our religion. They are as much a municipal law to the jews, as the municipal laws here to England, or the laws of *Solon* to Athens, or of *Lycurgus* to Lacedæmon, and therefore foreign to the present question.

On a complaint against general *Sabine*, a committee of the privy council examined a turk, sworn upon the alcoran; this agrees with the present case, and though not done in a court of justice it will not take away from the usefulness of the precedent for altering the form of an oath. This Indian witness was sworn by the very same words that we do, therefore the court will not presume that he means any other God than we mean.

It is of great moment that we should have commerce and correspondence with all mankind. Trade and policy require it; and in dealings of this kind it is of infinite consequence, there should be no failure of justice. It has been objected, that there might have been other evidence; but though there might be slighter evidence, why should we be tied down to it and debarred of the present

present which is stronger. Gentous are the common brokers in their country, and the *necessity* of the case is strong argument.

There was a time when even jews were not sworn; and on the 5th of November, 1732, there was a commission out of the exchequer, in the case of *Lopez, v. Nunes*, in which there was a distinction between the oath for jews and christians; for if jews, they were directed to be sworn *supra vetus testamentum* only.

An objection was likewise made, that this Indian would not be liable to be punished for perjury; to which it is answered, that if the court should be of opinion, that there is an oath which may be taken, of consequence he is liable to be punished, if forsworn.

Another objection is, that quakers could not be admitted as witnesses until an express act of parliament to empower them. The plain answer is, that they would not take the oath at all, therefore their solemn affirmation was not sufficient, because it had not the essence of an oath.

Upon the whole, as it is a case of *necessity*, and we have fully in proof from the return of the commissioners, that they *believe in the SUPREME BEING*, these witnesses ought to be admitted.

Mr. solicitor-general (*Murray*, afterward lord MANSFIELD, C. J.)

It is expressly certified by the commissioners, that the oath prescribed to be taken by our law, was read over to the plaintiff's witnesses. The *objection* is, that they have not made use of the corporal ceremony, the kissing of the evangelists. But they have made use of another symbol, the taking the priests foot with their right-hand, because this is the form and ceremony most binding in their own religion, and notwithstanding this, an objection has been taken to the reading of their evidence.

First, Because they have not touched the evangelists, and are pagans, and therefore cannot be admitted. *Secondly*, Supposing they may be admitted as witnesses, yet under the sanction of the oath thus certified, they ought not to be admitted as witnesses.

It is insisted, that the admitting their evidence is contrary to law, and they cannot be indicted for perjury. But, if the admission is not contrary to law, then of course the witnesses are liable to be indicted for perjury, as well as a jew, who may be indicted, *tañto libro legit mosaica*. The statute of 5 *Elizabeth* leaves this matter entirely open.

It is said, that no precedent or case of a heathen being sworn, according to the ceremonies of his own religion, existed before in England in courts of justice, proceeding according to the courts of common law: pagans have been sworn in the court of admiralty: but no wonder it has not existed before, because all our commerce is carried on by going to them, instead of their coming here.

The case of a jew as a witness in a private cause, never existed until after the restoration; they went out of England the 18th of *Edward* 1. and did not return until *Oliver Cromwell's* time. *Ante* 8.

The only authority of consequence cited, is a saying of lord *Coke's*. *Co. Litt.* 6. b. *That an infidel cannot be a witness*. This saying is not warranted by any authority, nor supported by any reason; and lastly, contradicted by common experience. Lord *Coke* meant jews as emphatically *infidels*, by shutting their eyes against the light; he hardly ever mentions them without the appellation of "*infidel jews*," and thus this noble king banished for ever these "*infidel usurious jews*," therefore *Hale* was not mistaken when he understood *Coke* meant jews for infidels as well as others. 2 *Inst.* 506, 507.

That all the law books, when they mention an oath, mean a christian oath, is no argument at all; *Fleta's* definition *magis licitum jurare per creatorem quam creaturam*: this shews the oath is not quite fixed, but like the oath sworn in the Roman empire after the establishment of christianity; and lord *Coke's* saying an oath is an affirmation or denial by a christian, is no wonder at all, for the laws of England could speak only of the christian oath, because they had no intercourse with pagans: and does it follow from hence, that no witnesses can be examined in a case that never specially existed before, or that an action cannot be brought in a case that never happened before? *Ante* 8. L. Reason,

Reason, the first ground of all laws and general principles, must determine the case: therefore the only question is, whether upon principles of reason, justice, and convenience, this witness ought to be admitted. He then laid down two propositions.

First, That by the practice of England, and of all the nations in the world that are christians, persons though not of the christian persuasion, may be admitted as witnesses, and sworn according to their own form.

Causes of law depend upon the occasions that give rise to them. Where the commerce and intercourse is most frequently with the pagans, the instances to be sure will most frequently arise.

After the Roman emperors were converts, christians, as well as those who continued pagans, swore according to their fancy, without any particular form. The corporal part, which prevails now all over christendom, was taken from the pagans; and, by degrees, under the Greek-Roman emperors, it came to be established that this ceremony should be used. The opinion of the Greek-Roman emperors, as to the oaths of persons of other persuasions is mentioned by *Selden*, "*Aliena autem persuasione homines per id quod venerantur illi, et juxta modum quo venerantur, adjurari consueverunt*," and he gives a long account of a particular ceremony in swearing a jew in courts of justice; and before the 18 *Edw. 1.* the person administering an oath to a jew said; if you dont speak the truth, *veniant super caput tuum omnia peccata tua, & parentum tuorum et omnes maledictiones quae in lege Mosaiica et prophetarum inscripte sunt semper tecum maneant*, to which he answered; *Amen*. *Seld. tom. 2. f. 1467, 1469.*

In Spain the turks possessed the greatest part of the kingdom, until the time of Ferdinand the catholic. What did they then do when christians and turks had controversy together? according to *Selden*, the form of the oath was in Spanish to swear as he hoped to be saved, by the contents of the alcoran. *Seld. tom. 2. 1470.*

The question did not arise here until after the restoration. No case of a turk sworn upon the alcoran in England but that before the council. Here is a material circumstance in this case; a court erected in Calcutta,
by

by the authority of the crown of England, where Indians are sworn according to the most solemn part of their own religion.

All occasions do not arise at once; now a particular species of Indians appears; hereafter another species of Indians may arise; a statute very seldom can take in all cases, therefore the common law *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.

The oldest books of all countries, mention the solemnity of an oath, as a security for a person's speaking the truth; they can do no more than lay him under the most sacred and binding obligations; they all call it appealing to God for the truth, and deprecating his vengeance as they speak truth.

There is not a book upon the general law of nature and nations, but admits that christians may allow persons to swear *per Dominum et per falsos DEO*. It is so laid down in the decretals, in *Grotius* and in *Puffendorf*, b. 4. *sect.* 4. p. 122.

The oath must be always understood according to the belief of the person who takes it; not only christian writers now, but before christianity, the world was divided into a vast variety of opinions, and yet every man was admitted to speak according to his own belief. *Dig. b. 12. t. 2. sec. 5. Lord Stair's Inst.* 694.

No authority has been produced from any other country that such oath ought not to be admitted: the reason why lord chief justice EYRE would not suffer the Indian, a worshipper of the sun, to be sworn upon the evangelists was, because he did not believe in christianity; but if he cannot be sworn at all, manifest injustice, and manifest inconvenience must follow.

Heathens bought the goods, heathens sent them, heathens knew the price, heathens kept the account, Would it do honour then to the christian religion, to say, that you cannot swear according to *our* oath, and therefore you shall not be sworn at all? what must the heathen courts think of our proceedings? will it not destroy all faith and confidence between the contracting parties? Is the case of the turk or jew, swearing according to their religion, different from the Indian's

swearing according to his? the objection is stronger against the turk, because he swears upon the alcoran, which we think an imposture; but the Indians here swear by one supreme God, without appealing to any particular book or authority in their religion.

It is said, that a heathen is not to be believed. Is it not known that all heathens believe in a GOD? No country can subsist a twelvemonth where an oath is not thought binding, for the want of it must necessarily dissolve society. *Tull. Tusc. Disput. lib. 1. sect. 13.*

Secondly, It is objected, that supposing that they may be admitted as witnesses, yet under the sanction of the oath thus certified, they ought not to be admitted, for that the form is ridiculous, and their notions of religion not certified by the commissioners. But the oath they have taken shews it, for the commissioners have certified that they have sworn by *one GOD*, and also proves that they think themselves under the tie of an oath.

Look into the books of Travels, and you will find that heathens, especially Gentous, believe in *one GOD*, the creator of the world, though they may have subordinate deities, as the papists who worship saints. *Relig. Cerem. vol. 3. 380, 381, 398.*

No doubt but they have a notion of God, according to *Tully*: but to use a greater authority than *Tully*, "They are a law unto themselves, which shew the word of the law written in their hearts, their conscience also bearing witness, and their thoughts the mean- while accusing or else excusing one another." *Paul's Epist. Rom. ca. 2. v. 14, 15.*

The corporal ceremony is a mere matter of form, and not of the essence of an oath: *Du Fresne's* glossary says, that monks swore by kissing the feet of the abbots; nay, the abbots swore by their word only, from whence the expression, *in verbum sacerdotis*: this shews it has varied much, and is all form.

Clerke, same side, in addition advanced, that religion *ex vi termini*, means the belief of the existence of a deity. That the necessity of admitting this evidence with regard to intercourses between christian countries themselves, appeared in *Voet's Comm. on the Pandects* 602.

That

That if this oath cannot be administered, because not upon the evangelists, the same objection will hold as to a Dutchman, who does not swear as we do on the new testament; and for the opinions of the commentators of the civil law he cited *Jacumb. 4 sect. ca. 4. t. 2.*

There was a time when swearing on the holy evangelists was not the practice here; for when St. *Austin* introduced the christian religion, the inhabitants were tenacious of their own customs, and therefore he indulged them.

There were not above twelve jews in the kingdom before the restoration. And they deputed one of the principal persons among them, to come over hither in order to find out whether *Oliver Cromwell* was the *Messiah* or not. He then cited *Madd. Hist. Excheq. 166, 167, & 174.*

Also *Calvin's* case, in which lord *Coke* says, "all infidels are in law *perpetui inimici*; for between them as with the devils, whose subjects they be, and the christian, there is perpetual hostility, &c." But he meant perpetual enemies in a spiritual sense, and quotes a passage in scripture to that purpose: *What concord hath Christ with Belial*, or what part hath he who believeth with an infidel. *2 Cor. ca. 6. v. 15. 7 Rep. 1 Trinity, 6 Jac. 1.*

The objection that no oath can be altered but by act of parliament, relates to particular officers of the crown. And as to the civil consequences of punishment for perjury, lord *Coke* says, that with respect to a person's being charged with a breach of oath, the question is, whether it was lawfully administered. *3 Inst. 164. Ante 8, 9.*

Then if the oath administered here is agreeable to the genius of the laws of England, will they not be liable to punishment for a breach of it; and he submitted, whether the crime may not be stated specially, and recite the ceremony of the witnesses taking the oath, provided it cannot be laid in the usual form?

Chute, in reply. On reasons from necessity he supported the argument of *Atkyns*, and then proceeded on the principal question, which he observed was endeavoured to be maintained by principles of reason, by authority of scripture, and by rules of the civil law.

The cases from scripture are not similar, and arguments *a pari*. It is natural to have a religion and to believe

believe in God; but it is otherwise in experience,
 " Their idols are silver and gold, even the works of
 " men's hands; they that make them are like unto them,
 " and so are all such as put their trust in them," *Psalms*
 115. v. 4. & 8. *Atkyns* 37.

As to the oath of *Abraham* and *Abemilech*, there was not then any set form, nor was it taken in a court of judicature. *Laban's* oath to *Jacob* was of the same kind, and *Jacob* accepted it, as thinking it better than no oath at all.

The witnesses are Gentous, and the commissioners should have certified their religion, so far as it was concerned in taking an oath, and as to their notions of a Deity's being a rewarder of good and an avenger of evil, *Maffaus's Hist. Judcor. lib. 1. fo. 36.*

The authorities from the civil law do not conclude upon the common law; for the civil law is not received as the rule of property here; much less in regard to criminal law. Civilians hold different rules of property among us, particularly in admitting evidence. They reject *histriones*, &c. and whole tribes of people. The greater part of the civil law is only opinions and sayings of great men; but the sayings of the common law are the opinions of judges, when the cause is judicially before them.

On the opinion of *Hale* he thought with *Atkyns*; and then argued against the insufficiency of the certificate; and then came to the material question—whether these witnesses were admissible by the law of England; and contended that they were not. By the statute of hue and cry, the party robbed was admitted from necessity, a third person being seldom present. Tradesmen's books were admitted, because there was a living person to attest them. In treason, that a wife may be admitted against her husband, is only an opinion of lord *Hale's*. The sayings of dying men may be given in evidence, but this is no more than giving evidence of a nuncupative will, and not so much evidence of words, as of circumstances. A man when he is just leaving the world, may be supposed to have a greater regard to truth; but on a trial for murder, this kind of evidence will

will not alter the sense of the court, if it should appear the deceased was killed fairly. In major *Oneby's* case it was mentioned by the special verdict, that the dying man said he was killed after the manner of swordsmen; but this did not over-rule stronger evidence. 9 *St. Tr.* 14. *Ante book 2.*

It is said, in matters of *custom and tradition*, hearsay evidence is admitted; and rightly so; for how can tradition be conveyed but from man to man through a suit of ages.

A *child* cannot be admitted *without oath*. LEE, C. J. and PARKER, C. B. ruled it so. *Ante b. 2.*

Great stress has been laid on lord *Coke's* putting jews on a foot with infidels; in another place *Coke* calls him an *infidel jew*, therefore describes him *secundum quid*, and not generally as an *infidel*. *Ante 8.*

Maddox's history of the exchequer, only shews that jews should be sworn. They had the promise of scripture largely given them, and the *evangelium* is equally applicable to the jews as to the christians; for the good tidings is not confined to the new testament. "And I will put enmity between thee and the woman, and between thy seed and her seed; it shall bruise thy head, and thou shalt bruise her heel." *Genes. ca. 3. v. 15.*

The *form of indictments* ought to be adhered to. If there was nothing but conscience to awe a person in taking an oath, from the depravity of mankind it would not be so binding. It is the apprehension of temporal punishment, which in a great measure prevails on persons to speak the truth.

There is no authority to shew, that indictments have risen otherwise than on the holy evangelists; and it is said in *Hall's* case, that the christian religion is part of the law of England.

If the jews may be reconciled to the new testament, it ought to have weight; and as they believe a part of the holy scriptures, it must give them a superior credit to persons who do not believe at all in the same manner with us. Suppose a christian should turn Gentou, and say I am not liable to be indicted, how must he be convicted

should be present to see him sworn. It is likewise the constant course in trials at bar and *nisi prius*; and, which is still stronger, there is an act of parliament to enforce it. *Anon.* 1 *Vern.* 263. *Francia's case*, 6 *St. Tr.* 68.

This overturns *Coke's* opinion so far as jews are concerned, and establishes *Hale's*.

The next passage in *Hale* relates to the special laws in Spain.

Consider now whether there is not such a *necessity* here as is sufficient to render this evidence admissible.

An objection is made, that the plaintiff ought to have shewn he could not have the evidence of *christians*. To this I answer, that repugnant to natural justice, in the statute of hue and cry, the robbed is admitted to be a witness of the robbery, as a moral or presumed necessity is sufficient: and that it shall be taken for granted there was the same *necessity* in the present case, as nothing is stated to the contrary. Besides, it appears that the plaintiff did commence a suit in Calcutta, and obtained a decree there, and what is very material, *Barker* himself, the father of the defendant, in that suit, in the mayor's court, insisted that *Omychund* should be asked, whether he was of the Gentou religion, and that he should be sworn according to his own notion of an oath, which was done accordingly. This certainly bound *Barker*, and of course his representative. 2. *Rolls. Rep.* 346. 1 *Salk.* 283.

What should hinder admitting them as witnesses? they are admitted by the civil law; by the law of nations; by the common consent of mankind. He there cited all the cases mentioned by the plaintiff's counsel, and lord *Stair's* Institute to shew the law of Scotland in this particular.

But it is objected, that these witnesses do not swear by the true *GOD*; and for this purpose the defendant's counsel cited *Deuteronomy*. Thou shalt fear the Lord thy God and serve him, and shalt swear by his name. Ye shall not go after other gods, of the gods of the people, which are round about. *Ca.* 6. v. 13 & 14.

On the other side, *Jacob* upon his covenant with *Laban* swore by the fear of his father *Isaac*. *Gen. ca.* 31. v. 53.

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My answer is, this is not true in fact, for they do swear by the *true GOD*, the creator of the world.

Lord *Hale* states a provision by the laws of Spain for moors; and oaths particularly adapted to the religion of the mahometans—but here the oaths taken by these witnesses is the constant oath, and taken in their own manner exactly.

Lord *Hale* makes a question, whether a turk or a jew may be admitted to give evidence upon murder. I think a jew a competent witness to give evidence upon a murder.

As to the form of the oath, it is not so solemn or significant as ours. The scripture has upon this occasion been cited, and I will therefore mention the opinion of a very great divine, *Tillotson*, in his assize sermon. The form of an oath is voluntarily taken up and instituted by man. 1 vol. 194.

In *Dutton, v. Colt*. Doctor *Owen*, vice chancellor of Oxford, being a witness for the plaintiff, refused to be sworn in the usual manner, by laying his right hand upon the book, and by kissing it afterwards; “but he caused the book to be held open before him, and he lifted up his right hand: the jury upon this prayed the opinion of the court, if they ought to think this testimony as strong as the testimony of another witness: and *GLINN*, C. J. told them, that in his judgment he had taken as strong an oath as any other witness; but said, if he was to be sworn himself, he would lay his right hand upon the book.” 1 *Siderf.* 6.

That forms are various, *Vid. Selden. t. 2. 1467. and Voet's Pand.* Christians were sworn sometimes without laying their hand upon the gospel, by lifting up their hands to heaven: jews were first sworn with rites and ceremonies, afterwards without any. It is plain, that by the policy of all countries, oaths are to be administered to all persons according to their own opinion, and as it most affects their conscience, and laying the hand was originally borrowed from the pagans.

It is said by the defendant's counsel, that no new oath can be imposed but by act of parliament, and for this

this purpose several cases were cited. My answer is, this is no new oath.

It was objected, that they ought not to be admitted as witnesses, from the perpetual enmity between heathens and christians, upon the authority of *Calvin's case*, 7 *Coke* 17, and *stat. 21 Hen. 8.*

This is to be understood of spiritual discord only: for *Edward Littleton*, lord keeper, in his readings upon *stat. 27 Edw. 3.* has sentiments there worthy of a great christian writer. "Turks and infidels," saith he, "are not *perpetui inimici*, nor is there a particular enmity between them and us, but this is a common error founded upon a groundless opinion of justice *Brooke*; for though there be a difference between our religion and theirs, that does not oblige us to be enemies to their persons: they are the creatures of God, and of the same kind as we are, and it would be a sin in us to hurt their persons." 1 *Salk.* 46.

In *Wells, v. Williams.* The court said, "that the necessity of trade has mollified the too rigorous rules of the old law, in restraint and discouragement of aliens: a jew may sue at this day, but heretofore he could not; for then they were looked upon as enemies; but now commerce has taught the world more humanity; and therefore held that an alien enemy, commorant here by licence of the king, and under his protection, may maintain debt upon a bond, though he did not come with safe conduct." 1 *Ld. Raym.* 282.

It was objected that this is a novelty, and that what has never been done ought not to be done.

The law of England is not confined to particular cases, but is much more governed by reason, than by any one case whatever. The true rule is,—“Where the law is known and clear, though it be unequitable and inconvenient, the judges must determine as the law is, without regarding the unequitableness or inconvenience; those defects, if they happen in the law, can only be remedied by parliament; but where the law is doubtful and not clear, the judges ought to inter-

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"pret the law to be, as is most consonant to equity,
"and least inconvenient." *Vaugh.* 37, 38.

As to *Lee, v. Lee*, before the court of delegates, 1692, they gave no opinion whether the witnesses were admissible or not.

The counsel for the defendant mentioned a note of a case taken by Mr. *Bunbury*, in the court of exchequer, in a cause between the *East-India* company and admiral *Mattheus*, "Where *Orangee*, a black, being offered as "a witness there, said he looked upon JESUS CHRIST as "a good man, and upon sending to the king's bench for "their opinion, they thought he could not be admitted, "because he did not *believe* in JESUS CHRIST."

This was a note of a case taken some time after the cause was heard, upon memory only, which at a distance of time is very treacherous: but I think the reason a very bad one, for the same would exclude the jews.

Another objection is, that the witnesses are not liable to an indictment for perjury.

This is not true in fact, but supposing it was, yet this is not the only case where witnesses cannot be prosecuted; for there is no possibility of prosecuting them where the depositions are taken out of England; but if they were here, I should be of opinion, they might be indicted upon a special indictment, for I do not think *tactis sacris evangelis* are necessary words, for several old precedents are, that the party was *juratus* generally, or *debito modo juratus*. *Wess's Symb.* part 2. sect. 160.

As to the precedents of indictments against jews, they are so various that nothing is to be drawn from them. Upon the whole, not to admit these witnesses, would be destructive of trade and subversive of justice, and attended with innumerable inconveniencies.

WILLES, C. J. C. P. First, as to the general question, whether any infidel may be admitted as an evidence, I am of opinion that some infidels may, under some circumstances, be admitted as witnesses. Lord *Coke* is plainly of opinion, that jews as well as heathens, were compromised under the same exclusion. Serjeant *Hawkins*, in his *Pleas of the Crown*, is mistaken in his notion of lord *Coke's* opinion, long before
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his time, and ever since the jews returned to England, they have been constantly admitted as witnesses.

The defendant's counsel are mistaken in their construction of lord *Coke*; for he puts the jews upon a footing with stigmatized and infamous persons. This notion is contrary to religion, common sense, and common humanity. The devils themselves to whom he has delivered them, could not have suggested any thing worse!

Our SAVIOUR and St. *Peter* have said, "*GOD is no respecter of persons.*" *Acts* ca. 10. v. 34. Lord *Coke* is a great lawyer, but our SAVIOUR and St. *Peter*, are in this respect, much better authorities than a person possessed with such narrow notions, which very well prove all that lord *Treby* has said of it.

Bracton, *Briton* and *Fleta*, lived in popish times, when no other trade was carried on, except the trade of religion. It is very plain too, these antient authorities speak only of christian oaths.

Maddox's history of the exchequer clears it up beyond all contradiction, that jews were constantly sworn; and from the nineteenth year of the reign of *Charles* the first to the present time, have never been refused.

He then opposed *Hale* to *Coke*, observing, that the former authority was full of the true spirit of good sense and christianity—and *decies repetita placebit*.

There was no occasion to have recourse to the civil law; and *Coke's* words in *Calvin's* case, and his 4 *Inst.* answered his own assertion: "If an oath was clearly of a christian institution, then I should be forced to admit, that it could not be allowed." *Ante* 8.

But oaths are as old as the creation, There are a variety of instances in *Genesis*, in the thirtieth chapter of *Numbers*, and throughout.

The nature of an oath is not at all altered by christianity, but only made more solemn, from the sanction of rewards and punishments, being more openly declared. The passage in the fourth chapter of St. *Matthew*, relating to *Herod* and the daughter of *Herodias* is very extraordinary; a person appears there to be so very wicked as not to stick at murder; and yet thought an oath of
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so sacred a nature as to choose rather to commit the former than break the latter.

Pythagoras in his golden verses, and *Tully* in several parts of his works, speak of an oath with the highest reverence. *Grotius de jura belli et Pacis*. 1 vol. b. 2. c. 13. *de jurejurando*, 1 sec. *apud omne : populos, et ab omni ævo circa pollicitationes, promissa et contractus, maxima semper vis fuit juris-jurandi.*

The form of oaths varies in countries, according to different laws and constitutions, but the substance is the same in all.

Grotius, in the same chapter, *sect. 10. Forma juris-jurandi verbis differt, reconvenit hunc enim sensum habere debet, ut DEUS invocetur, puta hoc modo, DEUS testis sit aut DEUS sit vindex.* In our old law books, *sic DEUS adjuvet*, and other expressions of the same nature, and now, *So help me GOD.* See *St. Matt. ca. 23. v. 20, 21, and 22.*

There is nothing in the argument, that as christianity is the law of England, no other oath is consistent with it. But though *infidels*, who believe in GOD, and future rewards and punishments in the other world, may be witnesses; yet if they do not believe in GOD, or future rewards and punishments, they ought *not* to be admitted as witnesses.

Next, as to dispensing with strict rules of evidence: such evidence is to be admitted as the *necessity* of the case will allow of: as for instance, a marriage at *Utrecht* certified under the seal of the minister there, and of the town, and that they cohabited for two years together as man and wife, was held to be sufficient proof they were married. *Alsop, v. Bowtrele. Cro. Jac. 541.*

It must be left to the jury or judge what credit they will give; for it is a known distinction, that the evidence though admitted, must still be left to the persons who try the cause, to give what credit to it they please; and therefore the same credit ought not to be given to the evidence of an infidel as of a christian; because not under the same obligations.

This cause relates to a mercantile affair, between *Barker*, a merchant and a subject of England, and an Indian

Indian merchant and a subject of the great mogul. The plaintiff had but one remedy, he follows his debtor into England. There can be no evidence without oath. It would be absurd for him to swear according to the christian oath, which he does not believe; and therefore out of *necessity* he must be allowed to swear according to his own notion of an oath. *Ca. on Infants, Post*

Next as to the commission. The certificate fully answers this objection: *that it does not appear they believe in GOD.* Great stress cannot be laid upon the authors who give an account of the Gentou religion, because it must depend upon their veracity and private judgment: but the certificate is sufficient, which says, "the Gentous believe in a GOD as the creator of the universe; and that he is the rewarder of those who do well; and an avenger of those who do ill."

On indicting for perjury, he concurred with the chief baron, and was of opinion, on the circumstances of the case, that the plaintiff's witnesses ought to be admitted.

LEE, C. J. B. R. Agreed, that where it is returned by the certificate that the witness *is of a religion*, it is sufficient: for the foundation of all religion is the belief of GOD, though difficult to have a distinct idea of an infinite and incomprehensible being as GOD is, yet mankind may have a relative idea of the being of a GOD as dependant creatures upon him.

An oath is a religious sanction that mankind have universally established. He declined declaring how far atheists and persons believing in no religion, may in some cases be admitted; but he apprehended the rules of evidence ought to be considered as artificial rules, framed by men for convenience in courts of justice, and founded upon good reason: but one rule can never vary—the eternal rule of natural justice. This case ought to be looked upon in that light, and considering evidence in this way, is agreeable to the genius of the law of England.

There is not a more general rule, than that hearsay cannot be admitted; nor husband and wife as witnesses against each other, and yet it is notorious, that from
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necessity they have been allowed: and not an *absolute* necessity, but a moral one.

Where there are *foreign* parties interested, or in commercial matters, the rules of evidence are not quite the same as in other instances in courts of justice. The case of hue and cry; a feme covert is not a lawful witness against her husband in cases of treason; but has been admitted in civil cases: a wife admitted to prove a trust: the same as to hearsay evidence. *Brownl.* 47. 1 *Hale*, P. C. 301. *Skinn.* 647. *Ante* 61. *Vide ca. Husband and Wife.*

As to admitting evidence in foreign matters and commercial, this is different from other cases. The testimony of a public notary, is evidence by the laws of France, and no other witness is necessary to prove the transaction. There can be no doubt, if it came in question, whether this was a valid contract, but a testimony from persons of that credit and reputation would be received as good proof in foreign transactions, and would authenticate the contract. 2 *Roll. Rep.* 346. *Cro. Car.* 365.

These cases shew, that courts always govern themselves by these rules, in case of foreign transactions. In cases of sales of goods a factor is admitted as a witness. *Preced. in Ch.* 207. *Tremoult, v. Dedire*, 1 *P. Will.* 429. *Comberb.* 340, 366. *Dockeray, v. Dickenson.* *Vide Bent, v. Baker.* *Ante*

He declined deciding, whether persons not believing in any religion should not be admitted: but these witnesses being under the religious tie of an oath, administered in a solemn manner; the transaction being wholly in the country of the mogul, and as *Barker* had forced the plaintiff to have recourse here to the law of England, by quitting a country where by the letters patent of the crown, they were intitled to justice, it would not be consonant to natural equity to deny them the benefit of this evidence.

He concluded by stating the statute, by which it is provided, a seizure or information shall be made upon any clause or thing contained in the act for increasing shipping and navigation, that then the defendant or de-

pendants, shall on his or their request, have a commission out of chancery to examine witnesses beyond seas, and have a competent time for the return thereof, before any trial shall be had upon the case, and that the examination of witnesses so returned, shall be admitted as evidence in law at the trial, as if it had been given *viva voce* by the examinee in court; any law, statute, or usage to the contrary in any wise notwithstanding. 13 and 14 Car. 2. ca. 11. sect. 20. *Vide Post*.

Lord HARDWICKE, Chan. *First*, as to the objection to the certificate and return of the commission, "That the commissioners have not followed the directions of this court; that they should have certified of what religion the witnesses were, and the principles of that religion; whereas they only certify them to be of the Gentou religion, without shewing what the principles are of that religion:" it was not the intention of the courts they should, for it would have been entering into a wide field, and would have been certifying the history of the Bramin or Gentou religion.

Cases have been determined at common law upon evidence taken from histories of countries, and we have very authentic accounts of this part of the world. A general history is evidence to prove a matter relating to the kingdom in general. 1 *Salk.* 281.

My intention was to be certified, whether these people believed the being of a God and his providence. *Churchill's* voyages particularly describes this religion, and their precepts of morality; the latter precept carries almost the sense of the ninth commandment.

This objection being removed, the next question will be—whether the deposition ought to be read; which depends upon two things. *First*, Whether it is a proper obligatory oath. *Secondly*, Whether on the special circumstances in this case, such evidence can be admitted according to the law of England.

Juris juramentum, est affirmatis religio sa: all that is necessary to an oath is an appeal to the supreme being, as thinking him the rewarder of truth and avenger of falsehood. *Bib. Saunderson de juris-juramenti obligatione* p. 5. and 18.

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This is not contradicted by any author but lord *Coke*, who has taken upon him to insert the word *christian*, and is the only writer who hath ingrafted this word into the oath. As to other writers they are all concurring. Dr. *Tillotson*, upon the lawfulness of oaths says, where the very text speaks plainly of an oath among all nations and men, "An oath for confirmation is to them an end of all strife. The necessity of religion to the support of human society, in nothing appears more evidently than in this, that the obligation of an oath, which is so necessary for the maintenance of peace and justice among men, depends wholly upon the sense and belief of a deity." *Puffend. lib. 4. ca. 2. sect. 4. Heb. ca. 6. 16 v. Tillotf. Serm. vol. 1. 189.*

Next, as to the form of the oath. It is laid down by all writers, that the outward act is not essential to the oath; *Saunderson* is of that opinion, and so is *Tillotson* in the same sermon. "As for the ceremonies in use among us in the taking of oaths, it is no just exception against them, that they are not found in scripture, for this was always matter of liberty, and several nations have used several rites and ceremonies in their oaths." 1 *Tillotf. serm. 144.*

All that is necessary appears in the present case; an external act was done to make it a corporal oath.

Secondly, Whether upon special circumstances such evidence may be admitted according to the law of England? there is but one general rule of evidence—*the best that the nature of the case will admit. Vide post. B. 2. ca. 1.*

The rule is, that if writings have subscribing witnesses to them, they must be proved by those witnesses. The first ground judges have gone upon in departing from strict rules, is an absolute strict necessity. Secondly, a presumed necessity. In case of writings subscribed by witnesses, if all are dead the proof of one of their hands is sufficient to establish the deed: where an original is lost, a copy may be admitted; if no copy, then a proof by witnesses who have heard the deed, and yet it is a thing the law abhors, to admit the memory of a man as evidence. 1 *Mod. 4.*

A tradesman's books are admitted as evidence, though no *absolute* necessity, but reason of a *presumption* of necessity only, inferred from the nature of commerce.

As to admitting *hearsay* evidence, see the case of *Cam-poverdi, Mich. 2 Anne*, in an action upon a policy of insurance. There is another instance of dispensing with a lawful oath, where our courts admit evidence for the crown without oath.

It is a common natural presumption, that persons of the Gentou religion should be principally apprized of facts and transactions in their own country: there is a stronger presumption of *necessity* here than for admitting a deed of thirty years standing; besides all this, an additional reason is, that the parties who entered into this contract presumed, that if they should be obliged to sue, it would be in their own country, and, then they must have been admitted. From hence it follows, that if one of the parties should leave this country and change his domicil, the other would be deprived of his evidence, which would have been admitted there, and by that means deprived of justice.

As the English have only a factory in this country, for it is in the empire of the great mogul, if we should admit this evidence, it would be agreeable to the genius of the English law. The courts of admiralty have done it.

In *Beake, v. Tyrrel*. An English ship was taken by a French man of war, under colours of a Dutchman, and carried into France, and there condemned as a Dutch prize. Afterwards an English merchant bought this ship of the French and conveyed her into England, where the right owner brought an action of trover for the ship against the purchaser; and all this matter being found specially, the defendant had judgment, because the ship being legally condemned as a Dutch prize, this court will give credit to the sentence of the court of admiralty in France, and take it to be according to right, and will not examine their proceedings; for it would be very inconvenient, if one kingdom should by peculiar laws, correct the judgments and proceedings of another kingdom. *Carth. 31.*

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If ~~we~~ did not give this credence, courts abroad would not allow our determinations here to be valid.

So in matrimonial cases, they are to be determined according to the ceremonies of marriage in the country where it is solemnized.

So suppose a heathen, not an alien enemy, should bring an action at common law, and the defendant should bring a bill for an injunction,—would any body say that the plaintiff at law should not be admitted to put in an answer, according to his own form of an oath? If otherwise, the injunction must be perpetual, and this would be a manifest denial of justice.

As to the most material objection of the form of indictments for perjury, the words *supra sanctum DEI evangelium*, are not at all necessary. Framers of indictments are apt to throw in words, and swell them out too much to no purpose; therefore the old precedents are the best; and, as has been said, this would prove too much, for it would hold as well to all depositions taken abroad.

It has been said by the counsel for the defendants, that the special law of Spain for taking those oaths, are of the nature of our acts of parliament. It is otherwise. *Selden*, upon the laws of *Alphonso*, the wise king of Aragon, saith, it is not a positive law for the moors, but authenticated by him, and transferred into his code of laws, and originally of the nature of what our common law is. Moors have their particular oath, which they ought to make in that manner. This form of expression rather shews that he refers to some other law that prevailed long before.

This falls in exactly with what lord *Stair*, *Puffendorf*, &c. say, that it has been the wisdom of all nations to administer such oaths, as are agreeable to the notion of the person taking, and does not at all affect the conscience of the person administering, nor does it in any respect adopt such religion: it is not near so much a breaking in upon the rule of law, as admitting a person to be a witness in his own cause.

As to the case of the *East-India* company, v. admiral *Matthews*. I was counsel in the cause, but do not remember

remember sending either to the court of king's bench or common pleas for their opinion. Mr. *Bunbury* has stated it as a trial at bar, before lord chief baron *Reynolds*, and therefore it could not be done, for there is no such thing as sending one judge out of a court to the judges of another upon a point of evidence. As to the case before lord chief baron *EYRE*, the person there would not be sworn either upon the old or new testament, and therefore as he was not a *christian* he would not admit him to be a witness. But upon the special circumstances of this case, I concur in opinion with my lords the judges, that the depositions of these witnesses ought to be read as evidence in this cause, and do therefore order that the objection be over-ruled and the depositions read. 1 *Ashyns* 21. 1 *Will*, 84. S. C.

In a case before the council, on the 9th of December, 1738, it appears that sir *John Strange* had considered of the principle on which the case of *Omichund, v. Barker*, was determined: for he reports, that on the complaint of *Jacob Fachina*, against general *Sabine*, as governor of *Gibraltar*, *Alderman Ben Mouso*, a *moor*, was produced as a witness, the two chief justices being present, and was sworn upon the *koran*; and he did not object to it. 2 *Strange* 1104.

So in *ATCHESON, v. EYERIT*, *Hil.* 13 *Geo.* 3. *B. R.* action upon *stat.* 2 *Geo.* 2. *ca.* 24. *sect.* 7. against bribery.

On motion for a new trial. Earl *MANSFIELD* declared, that the judgment in *Omichund, v. Barker*, had his approbation: for he says, "I argued, and the judges there agreed, that upon the principles of the common law, there is no particular form essential to an oath to be taken by a witness: but as the purpose of it is to bind his conscience, every man of every religion should be bound to that form which he himself thinks will bind his conscience most. Therefore, though the christian oath was settled in very early times, yet *jews* before the 18 of *Edw.* 1. when they were expelled the kingdom, were permitted to give evidence, and were sworn, not on the evangelists, but on the old testament: and no distinction was taken between their swearing in a *civil* and *criminal* case."

So

So a *turk* or *mahometan* may be sworn on the *alcoran*. As in the KING, v. JOHN RYAN, and others, *Old Bailey, December sessions, 1764*. The prisoners were indicted before ADAMS, B. and WILMOT, J. for stealing several articles the property of *John Morgan*, in the dwelling-house, &c.

John Morgan, the prosecutor, appeared to be a *mahometan*. The prisoners were therefore remanded in order to take the opinion of the JUDGES, whether a *mahometan* could be permitted to swear on the *alcoran*, in a prosecution for a capital offence?

GOULD, J. In February session, 1765, delivered it as the unanimous opinion of the judges, that he might be sworn.

An *alcoran* was accordingly produced. The witness first placed his right hand flat upon it; put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head; he then looked for some time upon it; and being asked what effect that ceremony was to produce, he answered, that he was bound by it to speak the truth. The prisoners were found guilty of stealing, but not in the dwelling house. 3 *Leach's Cr. Ca.* 3 edit. 64. *Cowp.* 390.

Rule the Third.

But an *atheist*, who professes to have no belief in the existence of a God; and of course disbelieves a future state of rewards and punishments, cannot be a witness.

For, persons denying the divine being and attributes of the Deity, cannot consider themselves bound by the obligation of an oath, and therefore not deserving credit are incompetent. *Bull. N. P.* 192. 1 *Att.* 45. *Ante* 64, 72.

Rule the Fourth.

So a person having no idea of a God or religion, who is altogether ignorant of the obligations of an oath, the existence of another world, and a future state of rewards and punishments, ought not to be sworn.

As

As in the KING, v. WHITE, *Old-Bailey, October sessions, 1786*. Indicted for horse-stealing.

Thomas Atkins was produced as a witness. He said, on being examined on the *voir dire*, that he had heard there was a God, and believed that those persons who told lies would come to the gallows: but he acknowledged that he had never learned the catechism, was altogether ignorant of the obligation of an oath, a future state of rewards and punishments, the existence of another world, or what became of wicked people after their death.

The court rejected him as being incompetent to be sworn; for that an oath is a religious asseveration and imprecates the vengeance of heaven, if the witness does not speak the truth; and therefore a person who has no idea of the sanction which this appeal to heaven creates, ought not to be sworn as a witness in a court of justice. *Leach's Cr. Ca. 2 edit. 337. 3 Edit. 483. Ante*.

NOTE. Where the objection to competency is grounded on the *infidelity* of the person produced to be sworn, the proper question to be asked, is not whether he believes in JESUS CHRIST, or in the *holy gospels of God*, but whether he believes in God, the obligation of an oath, and a future state of rewards and punishments. *Vide post. ca. which treats on self-accusation. Peake's Rep. of cases at N. P. 11. Ridgeway's Rep. of Leary's tri. Post*.

Rule the Fifth.

Dissenters from the church of England, as by law established, may be sworn according to the form and ceremony of their own particular sect.

As in COLT, v. DUTTON, *Mich. 1657, B. R.* Dr. Owens, vice chancellor of Oxford, being called as a witness, refused to kiss the book; but desired it might be opened before him, and he lifted up his right hand. The jury prayed the opinion of the court, if they ought to give the same credit to him as to a witness sworn in the usual manner.

GLYNN, C. J. told them, that in his opinion he had taken as strong an oath as any other witness. "But," said

said he, "if I were to be sworn, I would kiss the book,"
 2 *Siderf.* 6. 1 *Atkins* 31. S. C. *Atcheson, v. Everitt*
Cowper 390. S. C. *Ante* . S. C.

So in the KING, v. CHRISTIANA FITZPATRICK, *Old-Bailey sessions*, February 1786, Indictment for larceny.

David Milbourne, Scotch covenanter, was produced as a witness, who stated to the court that he was a North-Britain, and that the way of swearing in Scotland was not to kiss the book.

GOULD, J. said, that on the trial of the rebels at Carlisle, in 1745, finding it to be the ceremony of a particular sect, he admitted a witness to swear, by the form of holding up his hand, without touching the book or kissing it, and that he afterwards referred the case to the twelve JUDGES, who determined that the witness was legally sworn.

Upon the authority of this case, *David Milbourne* was sworn in the following form. "You swear according to the custom of your country and the religion you profess, that the evidence you shall give between our sovereign lord the king and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth." *Leach's Cr. ca.* 2 edit. 399. 3 Edit. 459.

Lord George Gordon, before he turned jew, was sworn in the same manner, exhibiting articles of the peace in the king's bench. *MS.*

Lord MANSFIELD cites the above case of the rebels as law. *Atcheson, v. Everitt. Cowp.* 390.

On the trial of the rioters, styling themselves "*The Protestant Association*," at *St. Margaret's-hill, Surry*, 1780.

Sylvester, for the prisoners, desired that some Irish Roman catholics who appeared as witnesses should be sworn on a new testament with a crucifix, or cross on it; and said, he was well informed, that persons of their persuasion were so sworn in Ireland by the magistrates, and in the courts of justice.

EYRE, B. Denied that such a custom could exist; and ordered the witnesses to be sworn in the usual way, *MS.* In the assertion the counsel was right—in the denial of the custom the judge was wrong.

Rule the Sixth.

Persons excommunicated cannot be witnesses, because by the laws of the church, such persons are excluded from human conversation. *Bull, N. P. 292. 3 Blackf. Com. 102.*

The church laws go still further: they excommunicate such as converse with those who are excommunicated, and consequently they cannot be examined in a court of justice. Beside, the church holds that those who are excluded from her pale are not under the influence of any religion.

When the several causes of excommunication exclusively recited by the statute are considered, it is impossible not to be surprized that they remain as unpealed exceptions to the competency of testimony.

First is *Heresy*, which whatever it may mean, implies a sense of religious obligation, and of conscientious acceptance of christianity itself, as divinely revealed. Here then does it presume a man to have no regard to the uttering of an injurious falsehood in the presence of the Deity, and in repugnance to that religion, the truth and authority of whose general doctrine he admits.

Second is *Error* in opinion in matters of religion and doctrine, received and allowed in the church of England. Now if the church of England were really infallible, it would be a misfortune to differ from her in any point, but certainly no ground of civil incapacity, especially so as to preclude a court of justice from being informed by a person labouring under that misfortune.

Third *Simony*. This transgression, considered as a corrupt trafficking, may indeed affect the credit of a witness, though the offence is constituted so strangely, that ecclesiastical right and wrong upon this subject enter commonly in a manner extremely perplexing to a lay imagination, should it attempt to define the principles of morality or sense by which the boundaries have been settled.

Fourth *Usury*.

Fifth,

Fifth, *Incontinence*, under which censure anti-nuptial commerce, or simple fornication was until very lately included, though the party should have made the *amande honorable* by intermarrying, as if being unguardedly awake to the impression of nature, demonstrated an insensibility to the influence of truth. *Vide 27 Geo. 3. ca. 24.*

Sixth, *Perjury* in an ecclesiastical court, closes the catalogue. And this under due conviction in the courts of common law, forms, and justly, a decisive exception to the competency. But if communication take place on this as an ecclesiastical charge, this extensive civil consequence is thus anticipated by sentence of a *forum*, whose rules of evidence are far different from those of the common law. *Vide stat. 5 Eliz. ca. 23. Morgan's Brit. Lib. 215. Lond. 1766. Gilb. Evid. by Loft 262.*

Rule the Seventh.

"Every *popish recusant* convict, shall stand to all intents and purposes disabled, as a person lawfully excluded, or communicated." *Stat. 3. Jac. 1. ca. 5.*

LORD COKE, on the authority of this statute, refused to admit a popish recusant a witness, between party and party. And,

In the *KING, v. MERVIN*, lord AUDLEY, anno 1631, tried for a rape, &c. before the lords: *Laurence Fitzpatrick* was produced; but, before his examination was read, the earl desired that neither he nor any other might be allowed as witnesses against him, until he had taken the oath of allegiance.

This was referred to the JUDGES, who resolved that they might be witnesses, unless they were convicted recusants. *2 Bull. 155, 156. 1 St. Tr. 392.*

HAWKINS, observing on the rule laid down by COKE, says, this is too severe, and that the purport of the statute is satisfied by the disability to bring an action; for that this, like all other penal statutes, ought to be construed strictly, in limitation of the penalty. *2 Hawk. P. C. ca. 46.*

This observation is founded in sound sense and legal policy, a disability introduced against a party, though by act of parliament, ought not by the force given to any of the general terms, produce a failure in the course of public justice. The person may be disabled as to any interest of his own, but the competency of testimony is an interest of society.

Rule the Eighth.

By statute, the *affirmation* of a quaker, therein described, shall be accepted: but it is also enacted by the same statute, that "No quaker, nor reputed quaker, shall by virtue thereof, be qualified or permitted to give evidence in any criminal causes, &c." *Stat. 7 & 8 W. 3. Irish. 19 Geo. 2. ca. 18. sect. 1, 2. 3 Stat. at large, v. 5. 777.*

On this rule it has been determined,

That a quaker's testimony on his *affirmation*, is admissible in an action of debt, on *stat. 2 Geo. 2. ca. 24. against bribery.*

ATCHESON, *v.* EVERIT. Motion for a new trial, because a *quaker* had been received as a witness on his *affirmation*, and it was objected that this being a *criminal cause* his evidence ought not to have been received.

LORD MANSFIELD, C. J. in delivering his opinion, said, that the question was of high importance, both as to all the quakers in the kingdom, and to the general administration of justice. That when the statute was made, the affirmation of a quaker, in his opinion, should have been put on the same footing as an oath in all cases whatsoever; and he saw no reason against it, for the punishment of the breach of it is the same. But even the indulgence they enjoy was obtained with much difficulty; for the legislature formerly looked upon non-conformists as criminals, and quakers in particular as obstinate offenders; but the more generous and liberal notions of the present times, do not look upon real scruples in the light of an offence. The statute was made for the ease of quakers; they were safe where the attorney-general could controul, but needed security from

from the persecution of individuals. In this act, however, there is an exception to their being admitted as *witnesses in criminal causes*, and serving on juries. The question therefore is, what the statute means by the words *criminal causes*. Great search has been made for precedents, and the result of the cases found is, that the courts of late years have, in favour of the quakers, relaxed their former severity. Their affirmation has been received in the case of an appointment of overseers. So in the case of an attachment against a quaker himself. *The King, v. Turner. 2 Strange 1219.*

No case has been found in which it has been refused where the action, though in *form of a criminal action*, in *substance* is a mere action between *party and party*. There was a refusal on the statute of hue and cry, but the ground was, that the quaker could not lay a foundation of the action without an *affidavit*. *27 Eliz. ca. 13. sect. 11.*

In cases where an action and an indictment both lie for the same act, as in assault, imprisonment, fraud, &c. a quaker is an admissible witness in the action, though not on the indictment.

It is a material circumstance, that actions for *penalties* are to a variety of purposes considered as *civil suits*—they may be amended at common law. To be sure the action in this case is not only given to recover a penalty, but it is attended likewise with *disabilities*. Therefore it partakes much of the nature of a criminal cause. Moreover, the offence itself is not merely *malum prohibitum* by statute, but it was indictable at common law.

But on general principles, the affirmation of a *quaker* ought to be admitted in all cases, as well as the oath of a *jew* or a *Gentou*, or any other person who thinks himself really bound by the mode and form by which he attests. *1 Atkyns 21. Ante 63.*

After the second argument his lordship added. That the experience of eight and twenty years, from the restoration to the time of the revolution, shewed that the obstinacy of quakers in refusing an oath, was not merely a pretence or colour given to right and wrong but that it was a *scruple*; and, that the sect was ready to go through
all

all kind of suffering in the pertinacious adhering to it. A more liberal way of thinking prevailed after the revolution; the principles of toleration were explained and justified, in consequence of the writing of Mr. LOCKE, lord SOMERS, and other great men of these times; and a statute passed, which though not general, was very extensive in the relief it afforded to scrupulous consciences, called the *toleration act*. 1 *Will. & Mary*, ca. 18.

The tenth section of that statute, enables quakers to give assurance of their fidelity and allegiance to the state, by *form of oath*, different from that prescribed by the law of England to christians. It is a form of oath, because it is appealing to the DEITY for the veracity of what they shall say, and invoking his vengeance if they utter what is false. *Ante 63. 1 Ath. 21.*

In six years after another statute, 7 & 8 *Will. 3. c. 34.* allowed a quaker to *affirm*, in cases where other persons are required to take an *oath*. He then stated the case of *Omichund and Barker*; and 2 *Siderfen 6.* Dr. *Owen's* case. *Ante 63.* And the determination in the *case of the rebels at Carlisle, 1745. Ante 47.*

Now all persons examined in criminal cases, must be examined on oath, both for and against the crown—therefore if a *quaker* be indicted, he cannot have the benefit of a quaker's testimony. *Stat. 1 Anne st. 2. c. 9. sect. 3. Irish stat. 19 Geo. 2. ca. 18. sec. 3. Ante 100.*

And concluded by delivering the opinion of the COURT to be, that the present was *not* a criminal cause, and therefore that Mr. Justice NARES did perfectly right in admitting the *quaker* to be a witness upon his AFFIRMATION. *Cooper 382 to 394.*

Rule the Ninth.

By this statute a quaker is not an admissible witness upon making an *affirmation* upon an *appeal of murder*.

As in CASTELE, widow, v. BAMBRIDGE and CORBET, *Bambridge* having been prosecuted, on the report of a committee of the house of commons, for the murder of the plaintiff's husband, who had been a prisoner in the
Fleet,

Fleet, under his custody as *Warden*, and having been acquitted the widow brought an appeal. The trial came on at *Guildhall*, before the *chief JUSTICE*, *sittings*, *Trinity* 3 *Geo.* 2. and the appellant's counsel called a *quaker*, and insisted that this is a *civil case*, in which he might be a witness. But the *chief JUSTICE* said, it was to this purpose a criminal proceeding, and therefore he could not be a witness. 2 *Strange* 857.

Rule the Tenth.

Neither is a quaker a competent witness on a motion for an *attachment* for not performing an award.

As in *ROBINS, v. SATWARD*. The COURT cannot ground an attachment for non-performance of an award, on the affirmation of a quaker, for though it be in a suit between party and party, yet it is a criminal prosecution within the proviso of *stat. 7 & 8 Will. 3. ca. 34*. Vide *Howel, v. Walker. Barnard, K. B. 145. Vide Rex. v. Bell. Saund. 200.*

Rule the Eleventh.

Nor is a quaker's evidence admissible on a motion for an *information* for a misdemeanor.

As in the *KING, v. GARDNER*. The affirmation of a quaker was offered in exculpation of the defendant, in shewing cause why an information should not be granted against him for a misdemeanor. This being objected to,

The COURT held, that a quaker's affirmation could not be read in *support* of a criminal charge. But they thought that an affirmation might be read in *defence* of a criminal charge, if the person charged was *himself* a quaker, in order to exculpate himself. And in this *third* case of a quaker's collateral evidence, in assistance of the exculpation of another person, where the quaker himself was not charged, they thought his affirmation *ought* not to be read. 2 *Burr.* 1117. Vide *Rex, v. Wych*, 2 *Strange* 872, 946, 1219.

Rule

Rule the Twelfth.

Nor can an affirmation be taken on exhibiting articles of the peace.

As in the KING, v. GREEN. On motion to exhibit articles of the peace on behalf of *Elizabeth Collet*, a quaker; she refusing to swear, the COURT said they could do nothing. 1 *Stra.* 527.

Rule the Thirteenth.

The result of the decisions cited, gives this general * rule—that where the form is *civil*, though the subject may be *penal*; or where the form is *criminal* but the object a *civil* remedy, the evidence of a quaker shall be admitted: being excluded in proper *criminal* causes, where the *form* and the *object* both denominate the suit, a prosecution for a public offence.

* In CHRISTOPHER LOVE's case, before the high court of justice, Mr. *Jaquel* refusing to be sworn, he was fined five hundred pounds; and the oath being afterwards read to him, but without his taking the book, for he laid his hand upon his buttons, on his saying he considered himself sworn and under oath, he was examined. 1 *St. Tr.* 114.

CHAPTER

CHAPTER IX.

Of Persons who are or may be consequentially affected by the event of the prosecution, and the distinction between interest and influence; competency and credit.

§ This chapter should have preceded the last, being naturally connected with the subject of it.

Rule the First.

Not only a person *immediately*, but a person *consequentially* interested in the event of a cause, has been held incompetent to give testimony. 2 *Hawk. Pl. Cr. ca.* 46.

In the three following cases this rule will appear to have been strictly adhered to.

1st. *The KING, v. WHITING, Mich. 10 Will. 3. N. P. Banc. Reg.* information against defendant for a cheat. The fact was, that by flight he changed a promissory note obtained from his mother-in-law, from ten to one hundred pounds.

HOLT, C. J. rejected the mother-in-law's testimony, because she was concerned in the suit, which was a means to discharge her from the hundred pounds. For though the verdict in the prosecution could not be given in evidence in an action upon the note, yet it would be heard of and influence the jury. And he could not distinguish this from the cases of perjury or forgery, where the party whose interest is defeated or prejudiced, by the forged instrument, &c. is no witness to prove the perjury or forgery. 1 *Salk.* 283. 1 *Lord Raym.* 396. *S. C.*

2^d. *The KING, v. NUNEZ, East, 9 Geo. 2. Banc. Reg.* perjury in an answer in the exchequer. The plaintiff in equity was called to prove the perjury assigned, on the authority of *Paris's case*, 1 *Vent.* 49. 1 *Siderf.* 431. and *The King, v. Moise*, 1 *Str.* 595. (where on an indictment for tearing a note, the proprietor of the note was admitted to prove the tearing.) But the chief justice ruled, that the plaintiff could not be a witness, and cited

the *King, v. Whiting*: observing that *Paris's* case was against *Twisden's* opinion. 2 *Stra.* 1043.

3d. The *KING, v. ELLIS*, *Mich.* 12 *Geo.* 2. *Banc. Reg.* indictment for perjury, in evidence given on a trial of an ejectment; the chief justice refused to let any of the defendants in the ejectment, against whom the verdict was given, be examined as witnesses for the prosecution. And it was said to be ruled so on conference with all the judges. 4 *Geo.* 1. The *King, v. Newens*.

In the following cases the strictness of the rule is relaxed, and a distinction laid down between *interest* and *influence*, which has been adopted with full approbation in all the courts of England and Ireland—

The *KING, v. BROUGHTON*. *East.* 18 *Geo.* 2. *Banc. Reg.* perjury. *Wharram*, employed the defendant's brother *James*, to sell an estate for him that lay at a distance, whom *Wharram* charged to have sunk seven hundred pounds of the purchase money, and filed a bill and obtained a decree for an account, upon the foot of an imposition. After this *Broughton* having pretended to have found a written account, wherein he had given *Wharram* credit for seven hundred pounds, reheard the cause and examined the defendant. The defendant swore that the account was sent to him by his brother into *Yorkshire*, to shew *Wharram*, which he did; and *Wharram* owned it to be his hand, and declared he had forgot it.

The CHANCELLOR was of opinion, this account was a forgery, and therefore did not vary his decree: but recommended the prosecution of *James*, who thereupon ran away. *Wharram* then indicted the defendant for perjury, and offered himself as a witness.

Strange for the prisoner, objected to *Wharram's* competency, on the authority of the *King, v. Nunez*, the *King, v. Ellis*, and the *King, v. Whiting*. *Ante* 105, 106.

KING, C. J. declared he was for hearing the evidence of *Wharram*, because, as no bill of exceptions would lie, the prosecutor would otherwise be without remedy; whereas the defendant, if convicted, might move for a new trial: but said he would give no opinion at present, further than observing, that in *Nunez's* case the suit in the

the exchequer was *then depending*; whereas the suit here in equity seemed to be at an end.

Whereupon *Wharham* was examined, and contradicted the defendant in all the parts of his examination; but being only a single witness on the part of the perjury he was acquitted. 2 *Str.* 1229, 1230.

In the KING, *v.* MAGARRY, *commission of oyer and terminer, Dublin, February 1795*; this distinction between a suit depending and a suit determined, as cause for admitting or rejecting a witness was taken by the court.

The defendant was indicted for perjury, in an answer to a bill filed in the exchequer.

Mac Nally objected to the competency of a witness produced to prove the perjury;—on the *voir dire*, he acknowledged that he was plaintiff in the cause in equity, and believed he had, as plaintiff in equity, an interest in the conviction of the defendant for perjury: on which CHAMBERLAIN, J. refused to receive his evidence. *M.S.*

And *Vide* lord MANSFIELD's definition of *credit*, in its legal acceptation. *Post. Rule 2. and p. 108. Wyndham, v. Chetwynd. Ante 15, 16.*

Rule the Second.

Where the objection goes to the *interest* of the witness, it affects his *competency*: where it goes to *influence*, it affects his credit.

Rule the Third.

Where the matter from which the objection results is doubtful, it goes only to his credit.

Rule the Fourth.

The question in a criminal prosecution, being the same with a civil cause, in which the witness is interested, goes generally to the credit.

Rule the Fifth.

Where the proceedings *cannot* be given in evidence to recover against the witness in another cause, the objection generally is to the credit only.

As in *ABRAHAM's qui tam, v. BUNN, Trinity 8 Geo. 3. Banc. Reg.* the decision in the *King, v. Broughton*, was recognized as law, and the court drew a legal distinction between objections which affect competency, and those which affect credit.

It was an action for an usurious contract, tried before lord MANSFIELD, at Guildhall: and a verdict found for the plaintiff. Upon which a motion had been made on the part of the defendant for a new trial, and a rule granted to shew cause.

The motion was founded upon the incompetency of the plaintiff's witness.

Benjamin Abraham, the witness, was the borrower of the money, and was called on the part of the plaintiff, to prove the usurious contract.

He proved the defendant to be a pawnbroker, and that he had pledged several jewels with him on several loans, some of which were redeemed: and he owned that this pledge had been returned, on the money borrowed on it being paid. The contract was proved by him to be usurious; and he proved it as charged in the declaration.

At the trial, after this man had given his whole evidence it was objected, that he could not be a competent witness, unless the repayment of the money was proved, and that he himself was not competent to prove the repayment of it.

LORD MANSFIELD, C. J. This was a motion for a new trial; because *Benjamin Abraham's*, said to be an incompetent witness, was examined and his evidence left to the jury.

It was a *qui tam* action upon the statute against usury. All the counts charge "that the defendant took, accepted, and received, from *Benjamin Abraham's*, the sum of so much money, by way of corrupt bargain and loan, for his forbearing and giving time of payment, from such a day to such a day of the sum actually lent."

There was no count as to any bond, assurance, or contract, whereupon or whereby usury was reserved or taken.

At

At the trial *Benjamin Abraham's* was examined for the plaintiff; and swore that the defendant was a pawn-broker; that he borrowed from the defendant several sums of money (specifying the time and sums) upon pawns (specifying them and their value) which were always more than double the value of the money advanced.

He swore to his having redeemed the pawns, specifying the times, and that the defendant before he would re-deliver the pawns, took and insisted upon the sums mentioned in the declaration, over and above the principal; which the witness paid, together with the principal, and received back his pawns.

He proved no bond or assurance of contract for usury, at the time of the loan; or for repaying the money; nor was any such additional security necessary, because the pawn, which was double the value of the debt, was the security, and was sufficient to pay it unless redeemed.

He was cross-examined, and after he had given his whole evidence, he was objected to as incompetent, (from what he had himself said, without any evidence whatsoever on the part of the defendant) because the repayment of the money lent was not proved by somebody else.

In strictness the objection came too late; after he had been sworn in chief, examined, and cross-examined.

The strictness of law in this respect is very wise, and ought to be more adhered to: for the relaxation may be abused, and must always occasion waste of time.

But I did not take it upon this foot, "of the objection's coming too late." I considered the objection as if it had been regularly made, before he was examined in chief, and as if the whole of his evidence had come out upon the *voire dire*. And in giving our opinion now, we consider it upon the mere merits of the objection, supposing it duly and regularly made. *Vide Post. Ca. 10.*

There is no case relative to the borrower's competence to be a witness upon a penal information against the usurer, wherein either the pleadings are stated, or the facts of the case stated, or any argument by counsel or the bench reported.

There

There is no case where the question ever came before any court in *Wghwinster-ball*, except *Smith's case*, *Trin. 8 Jac. 1. in C. B.* upon a trial at bar. 2 *Ro. Abr.* 685. *Title "Trial," letter G. pl. 2. Co. Litt. 6. b.* and many other books.

Two reasons are there given for universally rejecting the testimony of the borrower. *First*, Because it is really to be presumed his own cause, and that the nominal plaintiff is set up collaterally by him. *Secondly*, Because it would enable him to avoid his own securities, and discharge himself of the money borrowed.

The first reason is now totally exploded; for he is not now presumed to be the plaintiff in the cause.

As to the second—the proposition laid down is too large. For, there may be usury which cannot affect the debt, or avoid the contract. The clause that avoids the contract is, where the contract is more than five *per cent.* But if a contract be for only five *per cent.* and the lender afterwards takes more, he is liable to be prosecuted for usury, and to pay the penalty, though it does not avoid the contract. And where it would affect the debt it may have been paid. *Vide Long's case. Sir T. Raym. 191.*

All the other cases are loose notes of sayings, or opinions at *nisi prius*; general assertions, general inferences without particulars, without argument, without consideration, without any state of pleadings or facts.

The question being now come before the court, it is necessary to consider it with accuracy and precision.

The objection to the competence of the witness, can only be supported by arguing, either "that the events of this penal prosecution in favour of the plaintiff, will avoid the bond assurance or contracts of the witness, and discharge him from the debt;" or, "that this cause turns upon the same points and transactions which, if proved in another cause, would avoid the same."

The foundation fails in both propositions: and the consequence would not follow in the last, if the premises were true.

No

No contract or assurance appears here for usury; or so much as to repay the money. And if there was, the recovery of the penalty upon this information would not affect the contract. The judgment in this action could not be given in evidence, in an action for the debt, though the validity of the contract depended upon the same grounds as the information. That might indeed be a prejudice, *influence*, or bias, upon the mind of the witness, and go to his *credit*; but not an actual *interest* to go to his *competence*. *Ante* 15, 16.

This distinction has not been sufficiently attended to at *nisi prius*: the cases are contradictory, and it is impossible to reconcile them.

The great deference to lord chief justice HOLT's opinion, made the case of the *King*, v. *Whiting*, to be followed for some time: nay, lord HARDWICKE implicitly followed it, in the *King*, v. *Nunez*. *Vide Ante* 105.

At that time there were many cases both ways; a string of both sorts, (and amongst the rest *Watt's* case in *Hardress*, 331, 332. "That in forgery, perjury, or " usury, the party grieved shall not be admitted as a " witness, because he may receive a consequential advantage from the verdict; and *Paris's* case in 1 *Ventris* 49. where such a witness was admitted:) none of " which cases were considered or looked into."

But since the case of *Whiting* and the case of *Nunez*, there has been great light thrown upon the distinction between *interest* which affects the *competence* of a witness, and *influence* which goes only to his *credit*. There have been the arguments and judgments, the case of the *King*, v. *Bray*, mayor of *Trintagee*, before lord HARDWICKE, shook the authority of *Rex*, v. *Whiting*; which he there in effect contradicts, (though with guarded decency of expression) notwithstanding his having before followed it in the case of *Nunez*.

NOTE. Sir *James Burrow* says, lord *Hardwicke's* words were, "If that case was strictly examined, I believe it would appear that the objection on that case " went rather to the *credit*, than to the competency of " the witness."

Then

Then came the case of the *East-India Company, v. Gossen*. There was also a case of *Bailey and Wilson*; (about the proof of a will) before the delegates: who were equally divided, "whether the objection should go to the competence or credit of the only witness who proved the codicil, subsequent to a second will setting up again the first will;" and therefore no sentence was given. Thereupon a commission of adjuncts issued: a majority of whom (DENISON, J. being one) held "that it went only to the *credit*:" and sentence was given for the first will. Upon a petition for a commission to review it, it was fully argued: and lord HARDWICKE, on the 15th of *January*, 1744, gave a solemn opinion with the majority of the adjuncts, "that the witness having administered under the first will, as agent to the executor, or as executor *de son tort*, and being liable to actions, the objection went only to the *credit*, not to the competency."

The solemn discussion in these three cases, drew the line between *interest*, which goes to the competence, and influence, which goes to the credit. It established a rule, "that where the matter was *doubtful*, the objection should go to the *credit*." *Ante* 15, 16.

It established "that the question in a criminal prosecution, being the same with a civil cause, in which the witness was interested, went generally to the credit; unless the judgment in the prosecution where he was a witness could be given in evidence in the cause where he was interested. I say, generally, because all rules of evidence admit of exceptions."

After these cases, in that of the *King, v. Broughton*, in 1745, lord C. J. LEE over-ruled the three cases of *Rex, v. Whiting*, *Rex, v. Nunez*, and *Rex, v. Ellis*: which opinion of his has been followed since and approved. *Ante* 106.

There has been a remarkable case since I left the bar, *Trinity* 32 & 33 *Geo. 2. Bartlett, v. Pickersgill*. The defendant bought an estate for the plaintiff: there was no writing, nor was any part of the money paid by the plaintiff. The defendant articulated in his own name, and refused to convey; and by his answer denied any trust.

Parol

Parol evidence was rejected: and the bill was dismissed. The defendant was afterwards indicted for perjury, tried at *York*, and convicted upon evidence of the plaintiff, confirmed by circumstances and the defendant's declarations. The plaintiff then petitioned for a supplemental bill in nature of a bill of review, stating this conviction: but the petition was dismissed, because the conviction was not evidence. 22 Nov. 1762.

This reasoning shews too, that if it was necessary, the witness was competent to be heard, as to the debt being paid: the recovery could not be evidence. What he swore could not be evidence in an action for the debt. There is no danger of hearing of perjury, from hearing him. The defendant may produce the security and falsify him. If (as here) it is the case of a pawn, the witness would swear against his own interest to say untruly, "the debt was paid and the pledge returned." But, either way the debt is paid; for, unless the pledge be redeemed, it is a satisfaction.

Suppose a witness produces a bond, or note, or mortgage, cancelled—suppose he produces a receipt—there can be no danger in hearing him; for the jury are not bound to believe him. That depends on circumstances, which may contradict or support his testimony.

But if it be necessary to prove payment, and the party is not to be heard as a witness to prove such payment, the statute would be as effectually repealed as if the borrower could never be a witness at all: for they never would suffer any body else to be privy to the payment, delivering up, or cancelling the securities.

But to go further—all objections to the competence of a witness, must either be *proved*, or drawn from him on the *voir dire*; or take it in the utmost latitude, upon his examination. *Vide next chapter.*

Here was no proof of any objection; or of any doubt remaining. The witness swore, "That he should neither gain nor lose by the event of the cause;" in every shape in which the question could be put: and he shews it, by giving an account of the debt being paid. He swore upon a *voir dire* "that it was paid."

Had the defendant produced a security, or proved the pledge to be remaining in his custody, it would have been a different consideration, "whether the witness who was the borrower of the money, could be examined to contradict this." But when the whole ground of the objection comes from himself only, what he says must be taken together, as he says it, and then the debt is paid.

In every light, we are all of opinion, "that under all the circumstances of this case, *Benjamin Abrahams* was a competent witness," and consequently that the rule ought to be discharged. 4 Burr. 2255, 2256. Bull. N. P. 288, 289.

Rule the Sixth.

A bankrupt, although he offers to release to the assignees all interests, dividend, profits, surplus, and other benefits, which may arise from the discharge of a debt claimed by a creditor, is not a competent witness to prove such discharge until after he has received his certificate.

In MASTER's *qui tam*, v. DRAYTON, *Easter*, 28 Feb. 3. Action on the statute of usury, for taking more than legal interest on 500*l.* from the 10th of April, to the 20th of October, 1786, tried before HEATH, J. To prove the usurious contract and taking, *Lightfoot*, the borrower of the money was called; upon the *voir dire*, it appeared that he had not repaid the money, and that he was a bankrupt, and had not obtained his certificate; that the defendant was his assignee, and had proved this debt under the commission; whereupon the bankrupt (the witness) offered a release to the assignees of all interest, dividend, profit, surplus, &c. which might arise from the discharge of this debt, or from the increase of the fund by the deduction of it; and also a general release of all claim whatever to allowance and surplus. It was then objected by the defendant's counsel; *First*, that a certificate must be obtained before the bankrupt could be a witness, or the release operate to make him one; and *Secondly*, that the prospect of obtaining a certificate by increasing his fund, was an interest which rendered him incompetent.

incompetent. It was answered, that if a certificate had been obtained, the release would be unnecessary; and that the prospect was only an *influence*, which went to his *credit* and not to his *competence*. But the JUDGE being of opinion, that the release was only applicable to a debt due to a bankrupt, which he might release, or at least his share or advantage in, or from it, rejected the witness; and the plaintiff was non-suit.

Milles moved to set aside the non-suit and for a new trial. He contended it was immaterial by what means the stock or fund of the bankrupt was increased, if he discharged himself from all benefit arising from such increase. He cited *Nares* and another, assignees, *Salmon*, v. *Saxby*. A bankrupt was called as a witness on behalf of the assignees, to whom he had given a release, but not such an one as is generally given in these cases, which is a release of all such allowances as he may be entitled to under the commission. DE GREY, C. J. determined, that a general release was sufficient, as it discharged him from receiving any sum from the assignees. *Sitt. at Guildb. Hil. 19 Geo. 3. C. P.*

So in *Evans*, v. *Gold*, it is said, that the bankrupt cannot be a witness to swear property in himself, or a debt due to himself, without a release of his share in the surplus and the dividends, for else he is plainly interested; which indisputably proves, that such a release will render him a competent witness. *Bull. N. P. 43.*

The release therefore in the present case discharged the bankrupt of all interest which could affect him from the destruction of this debt of 500*l.* supposing that the action could be considered as working such an effect.

But upon the authority of *Abraham*, v. *Bunn*, this could not work such an effect. This created only an *influence*, which went to his credit, not to his competence: for though the bankrupt was still liable to an arrest for this debt, yet that was only an influence, and not an interest, and a distant influence too, because the defendant had proved the debt under the commission, and had acted as assignee under it. 4 *Burr.* 2251. *Ante* 108.

The COURT were of opinion, that this objection rendered the witness incompetent, and that he could not

be examined before he obtained his certificate, for notwithstanding the defendant had proved his debt under the commission, which he may do for the very purpose of preventing a certificate, that was no objection to his bringing an action at law and arresting the bankrupt for the whole debt. Rule discharged, 2 Term. Rep. 497, 498.

So in the KING, v. BLACKMAN, Hil. 34 Geo. 3. N. P. An information against the defendant, under statute 17 Geo. 2. ca. 40. s. 10. for having naval stores in his possession, contrary to statute 9 & 10 Will. 3. ca. 41. The first witness, a police officer, having sworn that he found in the defendant's possession the naval stores in question, was asked by the defendant's counsel on the *voir dire*, if any other person had given information of these stores, and answering in the negative, it was objected that the Stat. 17 Geo. 2. having given a moiety of the penalty of two hundred pounds, which that statute inflicts on persons having naval stores in their possession to the informer, and no previous information having been given to the admiralty, the witness must be deemed the informer and therefore interested.

It was answered, that the same statute also left it in the discretion of the judge to inflict a corporal punishment in lieu of such fine; that therefore before sentence it could not appear, whether the punishment would be pecuniary or corporal, and if the latter, that would rebut the supposition of interest. The witness then acknowledged that he expected part of the fine and refused to release.

Lord KENYON declared he considered him incompetent. That though there was an option in the judge to fine, or to inflict corporal punishment, the former mode had generally been adopted; and though the court had in one recent instance inflicted corporal punishment, that was because the person convicted had declared he did not regard a fine: therefore on the footing of interest, he considered the evidence of the witness inadmissible. *Espin. Reports* 96.

So also in the KING, v. EDEN, Hil. 34 Geo. 3. N. P. on an indictment for perjury. The assignment was, that
in

in an action wherein *Earle* was plaintiff, and *Brett* defendant; it became material to decide, whether the wines in question had been sold on account of *Earle*, or of *Eden* the defendant to the indictment. *Brett*, defendant in the action, was called as a witness, and being asked if he had paid the debt and costs in the action at the suit of *Earle*, answered that he *had not*, but that the bail *had been fixed*.

LORD KENYON refused to receive his evidence, observing, that in case *Eden* was convicted, *Brett* would be relieved in a court of equity against the judgment, the verdict having been obtained on the sole evidence of *Eden*; and therefore he had an *interest* which rendered him incompetent. *Esp. Rep.* 97, 98.

Rule the Seventh.

It is however held, that the interest to render a witness incompetent, must be a certain benefit or advantage arising to him from the event of the cause; or a certain charge or loss to which he may be liable: for a future or contingent interest; or a future or contingent loss which he may derive or suffer from the event of the cause, will not render him incompetent.

Rule the Eighth.

And where a bequest to a witness, or other immediate interest creates *incompetency*, yet if the witness executes a release, or offers a surrender of that interest, and it is refused, such refusal shall not deprive third persons of the benefit of his evidence: *a fortiori*, a release executed renders the releaser competent.

GOODTITLE, *lessee of FOWLER, and another, v. WELFORD, Easter 19 Geo. 3.* Ejectment in which the lessors of the plaintiff claimed under the will of *Elizabeth Bezley*; before lord MANSFIELD, *Westminster*. One *Hearle*, who was named executor in the will, and was also devisee of a reversionary interest, expectant on an estate for life, in some copyhold lands, part of the estate devised, was called on the part of the plaintiff to prove

prove the sanity of the testatrix, which was impeached by the defendant. To obviate the objection of interest, he had surrendered his estate in the copyhold lands to the use of the heir at law, but *he* had refused to accept the surrender.

The counsel for the defendant insisted that *Hearle* was an incompetent witness. *First*, because the surrender was ineffectual, and did not extinguish his interest, not having been accepted: *Secondly*, because he had acted in the executorship, having paid different legacies, and therefore had rendered himself liable to be sued, if the will should be set aside.

Lord MANSFIELD, C. J. Over-ruled both objections, and the witness being examined, the jury were satisfied of the sanity of the testatrix, and found a verdict for the plaintiff.

Bearcroft, Dunning, and Bolton, on motion for a new trial, for the defendant, besides the two objections to *Hearle's* evidence made at the trial, contended, that as executor he was intitled to the residue of the personal estate, not disposed of by the will, and was therefore interested on that account to support it.

The solicitor-general and Lane, for the plaintiff,—in answer to the objection, that *Hearle* might be liable to be sued for what he had done in the character of executor, if the will were set aside, relied on the case of *Lowe, v. Joliffe*, where one *Dovey*, an executor, who had released a legacy given him by the will, and therefore took no beneficial interest, was admitted on a trial at bar to prove the testator's sanity, although he was objected to, on the general ground of his being liable to be sued for his act as executor, if the will should be set aside, and also because he had actually sold a set of chambers, which had belonged to the testator, and was therefore answerable to the purchaser for the title. *East. 2 Geo. 3. 1 Blackf. Rep. 365.*

For the defendant, in reply it was said, in the case of *Lowe, v. Joliffe*, the purchaser of the chambers was in court at the trial, and upon the objection made, offered to release *Dovey*, and that *Dovey* was only admitted as a witness in consequence of that offer.

NOTE.

NOTE. According to the report in *Blackstone*, the court thought there was no occasion for a release. 1 *Blackf. Rep.* 366.

LORD MANSFIELD. A motion has been made for a new trial, not on the merits, but on the incompetency of a witness. When the witness was produced, the counsel for the plaintiff read his surrender of the copyhold estate, left to him by the will, but it was objected, that this surrender had not been accepted. The witness on being questioned said, he had acted as executor, and that the legatees had received their legacies under the will. On this ground also it was contended, that he was interested, because if the will should be set aside, he would be answerable for having answered *de son tort*. But he was not objected to on the trial, as being entitled to the residue of the personal estate. Now on such a motion as the present, no objection to a witness should be received which was not made at the trial. If this new objection had been made *then*, it might perhaps have been shewn that there was no residue, or a release might have been given, &c. As to the other objections—*First*, the bequest to the witness would certainly have gone to his competency, if he had not parted with his interest; but as he has parted with it, as far as depends upon him, third persons have a right to his testimony, and the surrenderee shall not deprive them of it, by refusing to accept the surrender. *Secondly*, it is contended, that, in an action concerning land, an executor is not a competent witness, because he may be sued for his administration of the personality. But he certainly has no immediate interest in the action, and it was determined by lord HARDWICKE, on a petition for a commission of review, and afterwards by the delegates, that it is no objection to an executor's testimony, that he may be liable to actions *de son tort*.

WILLES and ASHURST, J's. concurred.—Rule discharged. *Dougl.* 134, 135, 136.

The KING, v. WILLIAM NEWLAND, *Old-Bailey, February sessions*, 1784, before PERRY, B. present ADAIR, Recorder, *London*. Indictment for forging a bank note, signed

signed "*William Lander*, for the governor and company
"of the bank of England."

Lander was a cashier of the bank of England, properly authorized by the directors, to subscribe bank notes with his own name, for the governor and company: and had given security to them for the faithful performance of this duty.

The question was, whether he was a competent witness to prove, that the bank note charged to be forged was not a *genuine* bank note; and that the name *William Lander* subscribed thereto, was not his hand writing.

GARROW, for the defendant—contended that *Lander* was incompetent, from the interest which he had in the event of the prosecution; for, upon a supposition that he had signed the note, by virtue of the authority delegated to him for that purpose, by the court of directors, and had issued it so signed, without carrying it to the account of the bank, he would be liable to a criminal prosecution for the fraud, and to a civil action on his security bonds for the damage which the bank might eventually sustain; and therefore, although perhaps he was not liable to the holder for the amount of the note, he was deeply *interested* to swear, that the name subscribed to it was a forgery, as the only means of avoiding the detection of the fraud. An interest, however faint or remote, is sufficient to destroy the competency of the witness. A commoner who comes to say, that a common is not commonable, but for such a number of cattle, or to such a description of persons; a corporation who would confine the exercise of a franchise; a parishioner, in a question concerning the removal of a pauper, are all inadmissible witnesses on the ground of interest; and yet their interest is extremely distant and minute. A master may maintain the suit of his servant; but if he acknowledge that he is under an honorary consideration to pay his costs, he cannot be examined in the cause.

NOTE. A witness was rejected on this ground by PARKER, C. B. *per* PERRY, B. *The KING, v. WOOLRIDGE*, O. B. *Feb. sess. 1784.*

Suppose a servant assaulted in defence of his master; if on a trial of an action for this injury, the master were

were to declare that although he was not bound by law to defray the costs of an acquittal, yet that in honour and generosity he ought not to permit his servant to suffer, his testimony would be rejected, from the presumed bias of his mind on the ground of interest: for, to use the words of lord MANSFIELD, "courts of justice do not sit to weigh what degree of temptation the minds of men are capable of resisting, but to take care that they shall not be exposed to any temptations whatsoever." If this were the case of a common forgery, the objection would be unanswerable, for it is settled, that a person who has subscribed a note, and is therefore *prima facie* liable to pay it, cannot be examined to impeach the security, and the interest which *Lander* has upon the present occasion cannot be thought less considerable. 1 *Term. Rep.* 296.

Bearcroft for the crown, it has been the constant and unopposed practice of courts, to admit the cashiers of the bank to prove the forgery of their signatures to bank notes. It is certainly true, that when a witness is called to prove a proposition in which he is directly interested, to say "yes," rather than "no," he shall not be admitted as a witness to say "yes." I admit also that the question is not on the quantity of interest; for if an interest amounts only to five shillings, it is equally objectionable as if it amounted to twenty thousand pounds. I admit also that if *Lander* came here to prove the forgery of his own note, he would not be a competent witness, because his own note he would be, *prima facie*, liable to pay; but *Lander's* signature, as cashier of the bank, does not bind himself, for it professes to be "*for the governor and company of the bank of England,*" and the holder of a note so signed, can call only on the governor and company to pay it. The fact of *Lander's* not being personally liable, is a sufficient answer to this objection, for nothing but an immediate, direct, and personal interest, is sufficiently strong to overthrow the competency of a witness. The objection indeed cannot be speciously stated, except on a presumption of *Lander's* having abused his trust: but the rule of law is to presume innocence until guilt be proved; and therefore an interest

cannot be inferred from such a presumption, in order to ground an objection to the competency of his evidence.

COURT. This case is perfectly clear: *Lander* does not make himself personally responsible by signing bank notes in his own name, "for the governor and company of the bank of England," and the law will not permit so forced and violent a *presumption* to be raised, as that a witness is guilty of a crime, in order to lay a foundation to raise an objection to his competency on the ground of interest.

To repel the testimony of a witness, who comes to prove the forgery of his own hand writing, it must appear that he would be liable to be sued, in case the signature was genuine. The interest must be *apparent* on the face of the instrument itself; or arise *immediately* from the *nature* of the *transaction*; or from his own *acknowledgment*: for if a witness *admits* himself to have an interest, whether he hath an interest or not, yet the belief of it hath an equal operation on his mind; and in either of these cases it would be a legal objection to his testimony. *Vide Post*

In the present case, unless criminality be presumed, interest cannot be inferred, and such a presumption is certainly repugnant to the first principles of law. *MS. Leach's Cr. ca. 2 Ed. 256. 3 Ed. 350. Vide 1 Term. Rep. 296. Post. Dougl. 134. Goodtitle, &c. v. Welford. Ante 120, 121.*

Therefore in *CARTER, v. PEARCE, administratrix, &c. of BIGGS. Easter, 26 Geo. 3.* Declaration for work and labour, money paid, &c. Plea the general issue, except as to 2*l.* 5*s.* and as to that, a tender by the defendant, on both of which issues were joined.

HOTHAM, B. Tried the cause at *Salisbury*, when a verdict was found for the defendant, subject to the opinion of the court on a case, which stated that the sum of 2*l.* 5*s.* was tendered to the plaintiff by one *Wood*, who was one of the defendant's securities by bond in the ecclesiastical court, for her duly administering the intestate's effects.

The COURT, after argument by *Rikyll* for the plaintiff, and *Gibbs* for the defendant, said, no doubt could be

be entertained on the competency of the evidence; and that if a creditor of the administratrix had been offered as a witness, which was a stronger case, there could be no objection to his evidence being received. The bare possibility of an action being brought against a witness, is no objection to his competency. And,

BULLER, J. added—that this was not like the case of bail, because they are directly and immediately interested; for if a verdict be given against the principal, the bail becomes immediately answerable. In order to shew a witness interested, it is necessary to prove, that he must derive a certain benefit from the determination of the cause one way or other. 1 Term. Rep. 163. *Vide Grosz, v. Tracy. Peere Williams, 288.*

Rule the Ninth.

Public policy has established that no party who has signed a paper or deed, shall ever be permitted to give testimony to invalidate that instrument which he hath so signed; because every man who is a party to an instrument, gives a credit to it: but this rule only applies to such instruments as are negotiable.

As in *WALTON*, and others, assignees of *SUTTON, v. SHELLY. Trinity, 26 Geo. 3.* This was a motion for a new trial, on an action upon a bond given by the defendant to *Sutton*, to which there was a plea of *non est factum*, and another of the statute of usury. On the trial before BULLER, J. it was proved by one witness for the defendant, that the bond was given in consideration of delivering up two promissory notes made by Mr. *Perry*, payable to *Birch*, or order, the one indorsed by *Birch* and *Davenport Sedley*, the other by *Birch, Corbyn*; and *Davenport Sedley*, to *Sutton*. *Davenport Sedley* was then called by the defendant to prove, that the consideration for the notes was usurious, but his evidence was objected to on two grounds. First, that he was called on to invalidate a security which he had given; and that the indorser of a note, independent of any question of interest, could not be permitted to prove a note void which he himself had indorsed. Secondly, that he was

interested in the question which was meant to be put to him, for if the notes were given for an usurious consideration, he would never be liable to pay them, though by overturning the bond they might be set up again.

This motion was made upon the ground that *Davenport Sedley* was a competent witness, and ought to have been admitted to prove the fact of the usury.

LORD MANSFIELD, (after counsel were heard on both sides) said, the old cases upon the competence of witnesses have gone upon subtle grounds. But of late years, the courts have endeavoured, as far as possible, consistent with those authorities, to let the objection go to the credit, rather than the competency of the witness: in this case it seems to me, that the witness had no interest in the present question. If the bond is good, it puts an end to the notes; if bad, the same ground that vacates the bond vacates the notes, therefore in point of *interest* there is no objection to his competency. But it is a rule of law, founded on public policy, that no party who has signed a paper or deed, shall ever be permitted to give testimony, to invalidate that instrument which he hath so signed. And there is a sound reason for it, because every man who is a party to an instrument, gives a credit to it. It is of consequence to mankind, that no person should hang out false colours to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate that instrument which he has so signed. It is emphatically right in the case of notes, for in consequence of different statutes, two very hard cases have arisen. *First*, in respect to a gaming note, which though in the possession of a *bona fide* purchaser, without notice, is void. It is similar in the case of usury: a note given for an usurious consideration, though in the hands of a fair indorsee, is equally void. And therefore whenever a man signs these instruments, he is always understood to say, that to his knowledge there is no legal objection whatever to them. The civil law says, *nemo alligans suam turpitudinem est audiendus*. Now apply this general maxim to the present case, with the distinction which has been taken. It has been argued at the bar, that this rule only holds where

where the action is brought upon the notes themselves, and therefore not relevant to this case. But the cases are exactly the same. For the question on the validity of the bond, involves in it the validity of the notes. The obligee of this bond trusted to the notes; he gave them up as a consideration for the bond; he trusted to the name of the indorser, and that *he* knew of no objection to the notes; and yet this same person was afterwards called to say, that they were given for an usurious and illegal consideration; therefore I am of opinion, that he was an *incompetent* witness.

WILLES, J. Considered *Sedley* as having *no interest*; but that he came to give evidence against his interest; because by destroying the bond he sets up the notes. The general rule is, that no man shall be permitted to invalidate, by his own testimony, an instrument to which he is a party; and there has been no case cited in which this rule has been impeached; though there has been a case where a man was suffered to explain his own deed, but the explanation was against his own interest. It is better, in general, that objections of this kind should go to the *credit* than to the *competency* of the witness: but the present question falls within the general rule, that no man shall be permitted to alledge his own turpitude in having given credit to a false and illegal security.

ASHURST concurred.

BULLER. Two grounds of objection have been taken. The first steers clear of interest in the event of the cause. There is no foundation for the distinction attempted between the present case and an action on the notes themselves: for if an action be brought on a note against the drawer, an indorser cannot be called as witness for him, though he is not interested in that cause; and if a verdict be given against the drawer, and satisfaction obtained from him, the indorser is discharged. In that case it is his interest to charge the drawer, therefore there is no difference between an action upon the notes against the drawer, and the present action upon the bond—but the ground of objection has always been, that no man shall invalidate his own security.

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mony, he may not by this subsequent act deprive the plaintiff or defendant of the benefit of his testimony.

BENT v. BAKER, and *another*, in error. *Hilary 29 Geo. 3. B. R.* Assumpsit on a policy of insurance in the common bench. Plea the general issue. Lord LOUGHBOROUGH tried the cause.—The defendant produced *George Bowden*, an insurance broker, as a witness, to prove circumstances tending to shew, that the underwriters on the same policy were not liable to pay the loss; who being sworn said, that he was employed as a policy-broker by the plaintiffs, to procure the policy of insurance, in the declaration mentioned, to be subscribed by the defendant, and the several other persons whose names are subscribed thereto as assurers. And that he as such policy-broker, procured the same to be subscribed by the defendant, as an assurer for one hundred pounds, in such manner as in the declaration is in that behalf mentioned, and that he, within the space of one hour after the said policy had been so subscribed by the defendant, and the other persons whose names are subscribed thereto prior to the witness, subscribed the same policy for two hundred pounds, and became an assurer to the said *Peter Barker* and *John Dawson*, and that an action had been commenced against him at the suit of the plaintiffs; and was then depending in his majesty's court of the bench at Westminster, as such assurer for the said two hundred pounds, for and in respect of the said loss alledged in the declaration, and in which action the same question was depending as in this action against the defendant. And also that he, together with the defendant, and several other under-writers, upon the same policy had filed a bill in equity, in the court of exchequer against the plaintiffs, for a discovery of divers matters respecting the policy and assurance for the purpose of avoiding the same, and also praying to be relieved against the same, which bill in equity was then depending in the court of exchequer. And thereupon the counsel for the plaintiffs, on behalf of the plaintiffs, did then and there insist, that he was not a competent witness on behalf of the said defendant, upon the issue joined between the parties, whereupon the said defendant

dant and his attorney, produced a release duly executed by them to the said *John Bowden*, of all demands for any proportion or contribution of any costs, either in law or in equity, and that they would, at their own expence, procure the bill in equity to be dismissed as to them; but which offer the said plaintiffs did not accept, alledging, that the said suit was still depending, and there were other plaintiffs therein besides the defendant and *George Bowden*; whereupon the said chief justice did then and there refuse to admit the evidence of the said *George Bowden*, so offered as aforesaid. And the counsel for the defendant then *excepted* to the opinion of the chief justice; insisting, that the said *George Bowden* was a competent witness for the defendant, touching the matters in question.

Lord LOUGHBOROUGH, C. J. C. P. signed the bill of exceptions on which the whole of the above proceedings appeared.

Chambre, for the plaintiff in error—argued, that there seemed to be three objections to the competency of the witness. *First*, that he had a *direct interest in the suit*, inasmuch as he expected to contribute to the costs of it. *Secondly*, that he had an *interest in the question* put to him. *Thirdly*, that he had a *collateral interest*, arising from his being a party to a suit in equity, which might be affected by the decision of this suit. In answer to the first, *prima facie*, every witness must be taken to be competent until the contrary appears: the plaintiff therefore should have shewn some fact in this case to disqualify the witness. It should have been stated, that the witness was under some engagement to contribute to the costs; whereas it only appears that he *expected* so to do, which may mean a voluntary act. But even if there were any objection on this head it was entirely awed by the *release*, which was executed by both the defendant in the action, and his attorney. As to the *second* objection, the general rule appears from the *King, v. Bray*, and *Abrahams, v. Bunn*, to be, that a witness is competent, unless he has an interest *in the event of the suit*; though there are indeed exceptions to that rule, one of which is supposed to be, that of an under-writer on the same policy

policy in any action brought on that policy. But it is not necessary to contend here, that this is not an exception to the rule, because it does not apply to this witness. He was not originally an under-writer on the policy for himself, but acted as agent for the persons for whom the policy was effected. And when he had discharged his duty as agent, he was a competent witness for each party; then he could not by any act of his own, divest the parties of that right which they had in his testimony; still less could he do this by any act in concurrence with the assured themselves. In some cases, even though a person has an immediate interest in the suit, he must be admitted a witness from *necessity*, as where an agent of one person pays money to another, the agent is actually interested in proving the payment, as he thereby discharges himself to his principal. And the admission of this witness will not be productive of such mischievous consequences as the rejection of his testimony, because in contracts of this sort much depends on the representation of the broker. The *third* objection cannot be carried farther than the second, because it arises from the interest which he had acquired to himself, by improperly subscribing the policy, after he had acted as an agent between the parties; besides, it has been repeatedly determined, that it must be a *direct* and not a *consequential* interest only, to render a witness incompetent. *Carter, v. Pearce*, and *Bailey, v. Wilson*, cited in *Abrahams, v. Bunn. Ante*.

And here it is to be observed, that this created no *interest* in the witness, nor even any *bias* on his mind; for this record could not affect the suit in equity. Here too the bill in equity could not have been affected by this verdict as against this witness, if it were obtained on his testimony alone: for no man can recover on his own testimony: the courts of equity would oblige him to make out his case on other evidence. At all events, the same answer may be given to this as to the first objection, that it was done away by the offer at the trial, to dismiss the bill as to him, and to pay all the costs. In *Goodtitle, v. Wilford*, where the devisee in remainder of a copyhold estate, was called to prove the sanity of a testatrix,

testatrix, on his offering to release all his interest to the heir at law, he was held to be a competent witness, although the heir at law refused to accept the release. *Vide the cases cited and alluded to in this argument. Ante*.

Wood, for the defendants in error—whatever inconvenience may arise to the public, from brokers under-writing policies of insurance in their own names, it must be remedied by the legislature: but the established rules of evidence cannot be broken. Though *Bowden* might possibly have been a competent witness to some purposes, among others to prove the subscription of any under-writer, because he could speak to the fact merely in his character of agent; yet he was incompetent for the purpose for which he was called, namely, to prove something in which he was *equally interested* with all the other under-writers. That *interest* was a fatal objection to his testimony: and the court will be less inclined to over-rule this objection, because it was in the witness's power to remove his incompetency by paying his subscription. It was expressly determined in *Ridout, v. Johnson. Dougl. 134.* that one under-writer cannot be a witness in an action between other parties on the same policy. That rule has constantly prevailed since; and it shews that if the witness be interested in the *question* put to him, it is the same objection as if he were interested in the *event of the suit*. There is also another rule which would defeat the evidence of this witness, that a party shall not be permitted to give testimony to avoid an instrument which he himself has executed. This was ruled in *Walton and Shelly, 3 Term. Rep. 296*, where the witness was called to speak against his own interest: and there the rule respecting under-writers was recognized. As to the interest which it is contended the other under-writers had acquired in *Bowden's* testimony; that argument is intitled to little consideration, for they must all be taken to have subscribed at the same time, and the risk and the interest of the parties are the same. And if the plaintiff's argument were to hold, it would become necessary to consider at what time the witness became interested: but it has always been held to be a sufficient objection to a witness, that he is *interested* at the

the time of the trial. Otherwise the same argument would also apply to the case of commoners; and if one purchased his right of common a short time previous to the trial, he might be examined to any matter that arose before he became interested, since it might equally be said, that the other commoners had acquired a right in his testimony, of which he could not deprive them, by becoming a commoner himself. As to the case of *Barlow, v. Powell, Skin. 586. Bull. N. P. 290.* where HOL'T, C. J. ruled, that a person who made himself a party in interest, after a plaintiff or defendant had an interest in his testimony, could not deprive them of a benefit in his testimony, as if he be a witness of a wager, and afterwards bet on the same matter: that only shews, that after the wager he is a competent witness to prove the contract itself, but nothing more. For in *Refcous, v. Williams, 3 Lev. 152.* which was an action for money had and received, against the defendant, in whose hands a wager had been deposited by the defendant and another, it was held, that a person who laid the same wager was not a competent witness for the person on whose side he betted. Now a policy of assurance may be considered as analogous to a wager; and each under-writer has the same sort of interest which the better has in the case of a wager.

Chambre, in reply—the case of *Walton, v. Shelly*, did not establish as a general position, that in no case can a witness be called to invalidate an instrument which he himself has signed; for in a case which happened soon afterwards at the sittings, BULLER, J. held, that the rule only extended to such instruments as are negotiable; so that it does not apply to a case like the present. But even if it were to be considered as a general rule, still the particular circumstances of this case furnish an exception to it. The case in *Levinz* is contrary to universal practice; and it is answered by the rule laid down in *Skinner*, which is decisive on this head. It makes no difference here, whether the objection to this witness arises from his being interested in the question, or in the event of the cause, since the release discharged him from every interest in both. Besides, he was rejected generally; now,
if

if he were competent to answer *any* question, there must be judgment for the plaintiff in error.

LORD KENYON, C. J. After stating the case, said, the question is, whether under all the circumstances, *Bowden* was or was not a competent witness? Lord MANSFIELD, in *Walker, v. Shelly*, said, "that the old cases upon the competency of witnesses, have gone upon very subtle grounds. But of late years the courts have endeavoured, as far as possible, consistent with those authorities, to let the objection go to the credit, rather than to the competency of the witness." 1 Term. Rep. 300. *Ante*.

And if the opinion of so great a judge stood in need of any support, it would have it from the sentiments of lord HARDWICKE, in the case of the *King, v. Bray*, who said that whenever a question of this sort arose, on which a doubt might be raised, he was always inclined to restrain it to the credit, rather than to the competency of the witness, making such observations to the jury as the nature of the case should require. Rep. Temp. Lord. Hard. 360.

Fortified with two such authorities as these, there can be no doubt that, wherever there are not any positive rules of law against it, it is better to receive the evidence of the witness, making nevertheless such observations on the credit of the party as his situation requires. Then it is to be considered, what is the question put to a witness on his *voir dire*. It is, is he really interested in the cause? Sometimes, indeed, the counsel enter into the detail and ask how he is interested. But the general question involves in it all the others, and amounts to this, whether the record in that cause will affect his interest? upon that ground has the case of commoners proceeded. It is very probable that in *prescriptive* right of common, other persons living in the same manor may have correspondent rights: yet, unless the question turns on a *custom*, equally beneficial to them all, the testimony of one must be admitted to prove his neighbours right. But if the right be claimed under a *custom*, that all the inhabitants of a parish shall have a right of common, all those who fall under that description

tion are interested, because the verdict in that cause may afterwards be used in evidence to establish the same right in the rest.

Now in this case the objections made to this witness, may be resolvable into the three mentioned by the plaintiff's counsel. *First*, that he had a direct interest in the suit. It is true that he had an interest when he came into court to give his evidence, by virtue of that engagement which he has made, but the bill of exceptions also states, that the release was executed to him, which entirely removed that objection. The next objection is, that the witness was party to a suit in equity, and that eventually he was liable to the costs: but no persons but the plaintiffs below could call on him for those costs; now the defendants below and the witness, offered that the bill should be dismissed as to them at their own costs, which however was refused: But after such a refusal, neither in justice nor common sense can we suffer those parties to make the objection. Then the remaining objection is, that he was an under-writer on the same policy. There have been various opinions upon this subject, and it is impossible to reconcile all the cases. Then we have only to consider what are the principles and good sense to be extracted from them all. The principle is this; if the proceedings in the cause cannot be used for him, he is a competent witness although he may entertain wishes upon the subject, for that only goes to his credit, and not to his competency; as where he stands in the same situation with the party for whom he is called to give evidence there is no doubt but that may influence his testimony; or where a father is giving evidence for a son: but this does not render him incompetent, and such circumstances are always open to observation. So here the witness might have had his wishes; his situation might have created an influence on his mind; but the question still is, whether he was a competent witness? On the grounds stated he was. But there is another reason for admitting the evidence of this witness, on the authority of the case in *Skinner*, where it was ruled by HOLT, C. J. that where a person made himself a party in interest, after a plaintiff or defendant has

has an interest in his testimony, he may not by this deprive the plaintiff or defendant of the benefit of his testimony. Then what was the situation of these parties? We must recollect that the broker who effects the policy is the witness whose testimony must be resorted to, by both parties, in case of any dispute. He afterwards signed the policy himself, which he could not have done without the concurrence of the assured themselves, who had before entered into the contract of the defendant below, through the medium of this broker, and therefore he was to have been deprived of the benefit of his witness, by the very act of the plaintiff's themselves, who objected to his testimony at the trial. Then it has been said, that a person cannot be permitted to give evidence to invalidate an instrument which he himself has executed, but I cannot assent to that general proposition, for I remember a case of a trial at the bar of this court, where all the subscribing witnesses to the will were permitted to give evidence of the insanity of the testator at the time of making it. Now in that case, they came to destroy the instrument which they had attested, and though their testimony was ultimately discredited, yet no doubt was entertained respecting their competency. *Low, v. Joliffe. 1 Blackf. Rep. 365.*

I therefore entirely agree with the distinction taken by my brother BULLER, that where a person has signed a negotiable instrument, he shall not be permitted to invalidate it by his testimony. But that is not the case here. However, these are only the small points in the cause; and I again recur to that which is the principal ground of my opinion, namely, that the witness was not interested in the cause then depending; neither could the verdict by any possibility be produced by him in any subsequent suit.

ASHURST, J. concurred, confining his opinion to the particular circumstances of the case, and not deciding on general rules.

BULLER, J. This case involves in it the question, what objections go to the *credit*, and what to the *competency* of the witness. In *Ridout, v. Johnson*, it was held, that one under-writer cannot be a witness for another, and

and though it might have been determined on its own circumstances, judges at *nisi prius* guided by it, have frequently rejected under-writers as witnesses. Two objections argued at the bar are entitled to much consideration. *First*, that the witness was interested, because he was to contribute to the costs: the release is a clear and decisive answer to that. *Secondly*, that he was liable to pay the costs in the suit in equity; and the answer to that is, that he did every thing which he could do to discharge himself from that objection, by offering to dismiss his bill at his own costs. *Goodtitle, v. Walsford*, shews that if a person who is tendered as a witness, does every thing in his power to get rid of any objection to his testimony, it shall not be competent to the other party by an obstinate refusal to prevent his being examined. *Dougl. 134. Ante.*

Then the remaining and principal question is, whether this witness, having subscribed this policy as an under-writer, has thereby rendered himself altogether incompetent; because if he were competent to answer any questions, he ought not to have been rejected *generally*. Then we must see whether on this record, the fact to which he was required to speak, might be such as he was competent to answer. On the principle of *necessity* alone, this witness ought to have been received. If the question intended to be put to him were, as to any representation made by him to the under-writers, at the time of subscribing, he must be admitted a witness from *necessity*; for he was the only person, who from the nature of the thing, could speak to that transaction, and as such the under-writers had a right to call on him for his testimony. It is admitted, that had he been called on as an agent, he might have been examined: now *non constat*, but that was the case here, and he was rejected generally, the judgment must be reversed. On the general question, whether one under-writer can be examined for another, he thought there was no objection to his competency; and thought with lord HARDWICKE, in the *King, v. Bray*, that it was better to lean against objections to the competency, and to let them go to the credit of the witness: and the true line was this, "is
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"the witness to gain or lose by the event of the cause." Now this witness could not gain or lose by the event of this cause, because the verdict could not be evidence either for or against him, in any other suit. This has been likened to cases where witnesses have been rejected, on the ground that they shall not be permitted to invalidate instruments which they themselves have signed: but the ground of that objection is, that it is holding out false credit to the world, and must be confined to negotiable instruments. If a person were permitted to set aside such an instrument, it would enable him to commit a fraud. This witness should have been received.

GROSE, J. also assented, giving as his opinion, that unless a witness be interested in the event of the suit, he ought to be received. JUDGMENT reversed: and a *Venue de novo* awarded. 3 Term. Rep. 27 to 37.

In ROTHEROE and others, v. ELTON, N. P. after Trinity Term, 31 Geo. 3. the last case was fully recognized as law. *Assumpsit* on a policy of insurance on the plaintiff's goods, on board the ship *Jesse*, of Glasgow.

The plaintiff called the owner of the ship to prove that she was staunch.

Erskine objected, that the witness was interested in the event of the cause: he comes to exonerate himself from the action which the plaintiffs will have against him, if they fail in this action; for the law would imply a warranty on his part, that the ship was staunch.

Gibbs for the plaintiff, answered, that it was determined in *Bent, v. Baker*, that a witness was competent in all cases, except where the verdict to be given in the cause would be evidence for or against him, and that the verdict in the present cause could not be evidence in an action, by or against the owner.

LORD KENYON, C. J. The case of *Bent, v. Baker*, was determined on sound principles, but it was there held, that the witness was incompetent, not only in those cases where the verdict in the cause would be evidence for or against him in another suit, but also where he was directly interested in the event of the suit. This witness is directly interested in the manner mentioned by Mr. *Erskine*.

The plaintiff then released the witness, and recovered a verdict. *Peak. N. P.* 85.

And in *FOX, v. LUSHINGTON. Hil. 35 Geo.* The same judge, a similar objection was made to the deposition of *Barry*, the master and sole owner; and *no release* being offered, his deposition was not read. *Ibid.*

In *SMITH, qui tam, v. PRAGER. Mich. 37 Geo. 3. B. R.* The antecedent rules were recognized. Action for usury, before *KENYON, C. J.* *Bromer*, the borrower of the money, was called as a witness. It appeared, that he had paid several of the sums borrowed by him from the defendant; but was still indebted to him in 4000*l.* on a running account, for the several loans. *Bromer* had, before the trial, become bankrupt, and had not obtained his certificate: and it was objected, that he was not a competent witness, on the ground of interest; but the objection was over-ruled, and the plaintiff obtained a verdict. On motion for a new trial—

Law, Dallas, and Giles, were to have shewn cause—but, by desire of the COURT,

Erskine, Garrow, and Gibbs, contra, in support of their rule, contended, that the bankrupt was an interested witness, because he is called upon to impeach the legality of certain money transactions, which are items of the general balance that he owed to the defendant; for which if he did not obtain his certificate, the defendant may sue him directly; and if he does obtain it, he is equally interested in diminishing the amount of the debt to be proved under the commission; being entitled to the surplus of his estate, if any, or to an allowance in proportion to the dividend that his estate will produce. Even admitting, according to the authority of *Abrabams, v. Bunn*, (*Ante* .) that *Bromer* would have been a competent witness, after other proofs had been given that his drafts were paid, yet here he was called upon to prove that fact himself, and the repayments stated to have been made, were merely payments upon the general account between the witness and the defendant, and not distinct transactions: they admitted, that in *Bent, v. Baker*, (*Ante* .) the court seemed to have considered that the objection only went to the credit of the witness,

witness, unless the verdict in the particular cause would be evidence for or against him in another suit; but they also considered, that an interest in the event of the cause went to the competency of the witness. And here the verdict would be such an impeachment of the transactions, that the lord chancellor would not permit the items in the account to be proved under the commission, which would reduce the defendant's balance. In *Bearda, v. Abston*, in 1788, lord KENYON refused to let the payee of a note who had indorsed it, to prove it usurious until proof had been given by some other person that the note had been paid. And they cited also *Routbero, v. Elton*; *Trin. 31 Geo. N. P. Ante*.

Lord KENYON, C. J. adhered to the rule laid down in *Bent, v. Baker*, that no objection could be made to the competency of witness upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest. He then stated *Abrahams, v. Bunn*, to shew that by its authority the decision in *Bent* and *Baker* stood fully confirmed; and concluded by saying, that upon the authority of all the cases he was clearly of opinion, that *Bromer* was a competent witness in this case: and that the objection to the situation in which he stood went only to his credit, of which the jury were alone to judge. The other judges assenting, the rule was discharged. 7 *Term. Rep.* 60 to 63.

Rule the Eleventh.

A remote or trifling interest shall not destroy the competency of a witness—

And therefore it is no good exception against the admissibility of a witness that he had a maintenance from the king; for any one may maintain his own witness. This was determined in,

Richard Langborn's case, 31 *Car. 2. Treason*. NORTH, C. J. said to the prisoner, as to the witnesses receiving maintenance and sustenance from the king, that is but reasonable and no objection. An *approver*, while

while he is in the service, hath a penny a day, which in ancient times was a great matter, for livelihood and sustentance. 2 *St. Tr.* 891.

So it is no good exception to the competency of a witness that he hath received a reward for having made a discovery of the crime to be proved against the prisoner.

Or that he hath the promise of a pardon or other reward, on condition of giving his evidence, unless such reward be promised by way of contract for giving such and such particular evidence, or full evidence, or any way in the least to bias him to go beyond the truth, which not being easily avoided in promises or threats of this kind, it is certain, that too great caution cannot be used in making them. 2 *Hawk. P. C. ca.* 46. *Rookwood's ca.* 4 *St. Tr.* 684. *Vide p*

HALE however is of opinion, that if an accomplice be promised pardon, on condition to give evidence against the rest, that renders him incompetent; because he is bribed by saving his life to be a witness. On which KELYNG observes, that HALE takes a difference where the promise of pardon is to the accomplice for disclosing the treason, and where it is for giving evidence. 1 *Hale P. C.* 304. 2 *Hale P. C.* 2 *Hal. P. C.* 280. *Kely.* 18. But this opinion of HALE is over-ruled. *Vide p*

Rule the Twelfth.

If a witness *thinks* himself interested, although in point of fact he is *not*; he should not be examined as a witness.

As in *FOTHERINGHAM, v. GREENWOOD, Mich.* 5 *Geo.* 3. A. having money of the plaintiff in his hands, loses it at play; the plaintiff brings an action after the three months, upon statute of gaming, 9 *Ann. ca.* 14. and produces A. as a witness. Upon a *voir dire* he confessed, that if the plaintiff recovered he was not answerable, but that if he failed then the money was to be deducted out of his fortune, in the plaintiff's hands.

PRATT, C. J. Though the recovery against the defendant will not sink the demand for the money embezzled by A. yet his apprehension that the plaintiff will not trouble

trouble him for it, is a bias upon him: for if a witness *thinks* himself *interested* in the question, though in strictness of law he is not, yet he ought not to be sworn.

Darnell, serjeant, mentioned a case wherein *Mr. Chapman*, of Bucks, having owned himself to be under an honorary, though not under a binding engagement to pay the costs of the suit. PARKER, C. J. on solemn debate refused his testimony. Earl MANSFIELD has laid down the rule for legal decision on the point, that "Courts of justice do not fit to weigh what degree of temptation the minds of men are capable of resisting, but to take care they shall not be exposed to any temptation whatsoever." 1 *Term. Rep.* 296. *Ante*.

In the KING'S BENCH, at the sitting, *Mich. 15 Geo. 3.* On a trial respecting a patent. The patentee produced his journeyman, who stated to the court, that he had entered into articles to work a number of years for the patentee, and to receive a sum of money upon the patent; an objection was made to his testimony, and a release of the articles being executed by the witness in court, it was contended that the objection was removed: but a question was put to him, whether although he had discharged his master from all the obligations he was under to him, he did not expect when he was out of court to be restored to the situation he was in before? And, he answered—"I believe my master is an honest man, and that he could not do the work without me; and therefore I am well convinced I shall be put into the situation from which I have released myself."

Lord MANSFIELD, C. J. Upon the idea that the witness's imagination led him to suppose that he should certainly be restored to his former situation, rejected his testimony, and would not suffer him to endanger his veracity by being examined on the trial, repeating what he had once before said in delivering a solemn judgment from the bench, that—*Vide*, the last cited case. *Ante*. Cited by COWPER in *Mr. Rudd's case*. *Leach Cr. Ca.* 2 *Edit.* 110. 3 *Edit.* 154.

So in criminal cases, where a man is indicted for *forgery*, the party whose hand is said to be forged, shall not be admitted to prove the fact charged of forgery;
for

for his hand apparently against him, is evidence (until the contrary be proved) of an obligation: and therefore he shall not be permitted in the indictment to make proof (while he hath interest in the question, the supposed obligation standing in apparent force against him) that it was not his hand. *Gilb. Evid. by Loft*, 222, 223. *Bull. N. P.* 288.

And therefore in the *KING, v. Dr. DODD*, *Old-Bailey, Febr. sess. 1777*. The earl of *CHESTERFIELD*, whose name appeared to the bond, for the forging of which *Dr. Dodd* was convicted, being produced as a witness on the trial, to prove that the name *Chesterfield* was not his signature; on producing a release from *Henry Fletcher*, the supposed obligee of the bond was admitted to give evidence. *Leach Cr. Ca. 2 Edit.* 144. *3 Edit.* 184.

So also on an indictment for forging a receipt for the payment of money, the person whose name appears signed to the receipt is *not* an admissible witness to prove the forgery.

As in *Russel's case*, *Old-Bailey, February sessions, 1737*. The prisoner was indicted for forging an acquittance and receipt, with an intent to defraud *R. Gately*.

The prisoner's counsel insisted; that neither *Gately's* testimony, nor any affidavit made in his name, could be admitted in evidence, on the ground of his being *interested*: and cited the *King, v. Whiting*. *Salk.* 283. *Vide Ante*.

For the crown it was contended, that *Gately's* evidence was admissible, for it went to establish the defendant's guilt; and the consequence of his conviction would be, an immediate forfeiture to the crown of all the property he possessed: therefore *Gately's* evidence would tend to deprive himself of the possibility of ever receiving satisfaction for the sum due to him on this account. The objection of *incompetency* arises from the *sort of interest* which the witness may have in the nature of the question, or the event of the trial, and if any *advantage* may accrue to him from giving his testimony, the law in consideration of the frailty of the human mind, renders his evidence inadmissible. But when the effects of a testimony tend to *deprive* the witness of a substantial

tial benefit, the law allows his evidence upon the conception, that he will not untruly charge himself, or say any thing wrongfully to his own disadvantage. The court however rejected the evidence offered. *Leach Cr. Ca. 2 Edit. 8, 9. 3 Edit. 10.*

So also on an indictment for forging a *letter of attorney*, whereby the prisoner transferred stock, the proprietor of the stock is not a competent witness to prove the forgery.

As in the KING, v. RHODES, *Old-Bailey sess. 13 Geo. 1.* Indictment for forging a letter of attorney, whereby the stock of *Heybam* was transferred: FORTESCUE, J. refused to admit *Heybam* as a witness. 2 *Str.* 728.

But the proprietor of stock is a competent witness to prove the amount of the stock, and the interest due thereon, at the time of committing the forgery.

As in the KING, v. FRANCIS PARR, *Old-Bailey sess. Jan. 1787*; the defendant was indicted on *stat. 31 Geo. 2. ca. 22. s. 77.* for personating *Isaac Hart*, of *Windsor*, the proprietor of 3900*l.* capital stock, and thereby endeavouring to receive 58*l.* 10*s.* as for half a year's annuity; and on the trial *Isaac Hart*, the proprietor of the stock, was admitted a witness, and examined to prove the amount of the stock which he had at the bank, and that the sum of 58*l.* 10*s.* was due to him for half a year's interest due thereon. *Leach Cr. Ca. 341, 345. MS. VIDE the antecedent chapter throughout.*

So in *Waller, v. Shelly.* The indorser of a promissory note comes within the rule therein laid down, viz. that the indorser of a note, independent of any question of interest, could not be permitted to prove a note void which himself had indorsed. 1 *Term. Rep.* 296. *Ante*

Though it is held as a general rule, that a person whose hand is forged to a deed or other instrument, cannot be admitted to prove the forgery. Yet under many circumstances he may be admitted to prove such forgery, as where he is not directly interested in the question.

As in *WELLS's* case at Oxford, the defendant was indicted for forging a receipt from a mercer in that city; and the mercer having before recovered the money in an action against *Wells*, was admitted to prove the forgery, by *WILLES, J. Buller, N. P. 289.*

So in an indictment for *perjury* on the statute, the person injured cannot be a witness, because the statute gives him ten pounds, but in an indictment at common law the party injured may be a witness. *Stat. 3. Eliz. ca. 9. Irish 28 Eliz. ca. 1. 3 Geo. 2. ca. 4. 2 Hawk. P. C. ca. 46. Bull. N. P. 289.*

Rule the Thirteenth.

In criminal cases witnesses, though apparently interested, are admitted from necessity. *Ante*.

As in the *KING, v. MACKARTNEY*, and others, *Mich. 2 Ann. B. R.* Indictment for a cheat done to J. S. by imposing upon him a quantity of beer mixed with vinegar, and grounds of coffee for port-wine, and getting in exchange hats to the amount of 118*l.* one of the defendants pretending to be a broker, and the other a *Portuguese* merchant, for the better carrying on the cheat. *HOLT, C. J.* allowed J. S. to be a witness to prove the fact upon the trial; observing, that in such private transactions no body else can be a witness of the circumstances of the fact, but he that suffers. 1 *Salk.* 286. *Holt* 300. *S. C.* 6 *Mod.* 301. *S. C.* 2 *Lord Raym.* 1179. *S. C.* 1 *Siderf.* 431. 2 *Keb.* 572. 1 *Ventr.* 49.

So in the *KING, v. MOISE, Trinity*, 10 *Geo. 1. N. P.* the indictment against the defendant was for tearing a note, whereby he promised to pay A. B. a certain sum of money. A. B. was produced as a witness. It was objected that he was incompetent, as by giving evidence he would set up his own demand: because if the defendant was convicted, the court would oblige him to give the witness a new note. But the judges *FORTESCUE* and *RAYMOND* admitted her evidence. 1 *Strange* 595.

So in the *QUEEN, v. SEWELL, Mich. 1 Ann. B. R.* Indictment for usury. *HOLT, C. J.* said. Where a man is interested in the consequence of that which he swears for, if it be so that the doing the act which he is now evidence to invalidate or set aside, was a means to obtain his liberty from imprisonment, or an exemption from corporal punishment, he shall be a witness; as in the case of dury, though it be to set aside his own bond.

He

He shall be a witness also where the nature of the thing allows him no other evidence : as if a woman give a note or bond to a man to procure her the love of J. S. by some spell or charm, in an indictment for the cheat, though it tend to avoid the note yet she may be a witness. 7 *Mod.* 119, 120.

And on the same principle "necessity" the wife, where the injury is committed on herself, is a competent witness against her husband. Vide *Lord Audley's ca. &c. Post*.

So laying a wager doth not incapacitate a man from being a witness.

So in the *KING, v. FOR, Mich. 12 Geo. 1.* Assault. It was proved that the prosecutor had laid a wager that he would convict the defendant. The Chief Justice held him a good witness for the king, though the objection went to his credit. 1 *Stra.* 65. 3 *Lev.* 152.

CHAPTER X.

Of examining a witness on the voir dire, in order to discover his competency.

VOIRE DIRE, *veritatem dicere*, is when it is prayed upon a trial at law that a witness be sworn, that he "shall true answer make to all such questions as shall be demanded of him, and shall speak the truth, the whole truth, and nothing but the truth."

Rule the First.

This examination, which is for the purpose of impeaching the witnesses competency, and thereby preventing him from being sworn in chief, is allowed in *criminal* as well as in *civil* cases.

As in lord *LOVAT's* case impeached before the lords of England for high treason, 20 *Geo. 2.* a witness was examined

examined by the prisoner on the *voire dire*. 9 St. Tr. *639, *689, *704, *705.

So in the KING, v. DURHAM and CROWDER, *December sessions, Old-Bailey, 1787. Leach Cr. Ca. 2 Edit. 375. 3 Edit. 538. Ante 108.*

Rule the Second.

An objection to competency in strictness, should be made by an examination into the interest of the witness upon the *voire dire*, before he is sworn in chief.

In ABRAHAMS *qui tam*, v. BUNN, *Trinity, 8 Geo. B. R.* the witness whose competency was impeached, had previously been examined and cross examined.

LORD MANSFIELD said, in strictness the objection came too late; and the strictness of law in this case is wise, and ought to be more adhered to; for the relaxation may be abused, and must always occasion waste of time. *Ante 109.*

This strictness however, seems to be confined to civil cases. In prosecutions for offences, whenever the incompetency of a witness appears, the court will arrest his evidence, and direct the jury to discharge their minds from his testimony. The difficulty of a jury divesting themselves of the impression, which facts sworn to must affect, shews that wherever the objection can be made upon the *voire dire*, it should never be omitted; for the defendant must receive a benefit from the decision of the court, even though the opinion went no further than that the objection affected only the credit of the witness.

Rule the Third.

An examination on the *voire dire* can only go to establish whether the witness can *gain* or *lose* by the matter in controversy, and if it appears that he is unconcerned, his testimony is allowed, otherwise not. *Blount, Jacob, Cunningham's, Cowele. Edit. 1727, Dictionnaires.*

Rule

Rule the Fourth.

On a *voire dire* a witness may be examined by the court, if he be not a party interested in the cause, as well as the person for whom he is a witness. *James de Ley.*

This has been often done, where a witness not otherwise to be excepted against, is suspected of partiality. *Ibid.*

Rule the Fifth,

Where it appears to the court that the question to be put to the witness on the *voire dire*, goes to affect his credit, and not to impeach his competency, the court will not allow it to be put.

As in the KING, v. CHRISTOPHER LAYER, Esq; B. R. *Michaelsmas 9 Geo. 1.* Indicted for high treason.

Stephen Lynch being produced as a witness on the part of the crown; Mr. *Layer*, the prisoner, desired he might be examined on the *voire dire*, whether he had a promise of pardon or some other reward for swearing against him.

PRATT, C. J. said, the question could not be asked.

Hungerford and *Kettleby*, the assigned counsel for the prisoner, argued for putting the question, that a person proposed as a witness, must be a credible legal witness, not convicted of perjury, or any infamous offence, and under no restraint for the offence he accuses another of, and therefore it was matter of right to ask the witness on the *voire dire*, whether he acted under the influence of promise, of pardon, or reward; and to shew that such promise rendered a witness incompetent, he cited 2 *Hale's P. C.* 289. *Kelyng* 18.

They also cited the *King, v. Donell, Gordon, and Kerr*, and the *King, v. Palmer and Symonds*, for murder, at *Worcester*. In the last case, a third person concerned in the fact came in as a witness against the other two, and after argument on the authority of *Hale*, the witness was sworn upon the *voire dire*, and asked the question now proposed.

The *attorney* and *solicitor-general*, and *Pangelly* and *Chefbire*, serjeants, answered, that the objection only went to the credit of the witness, and the cases cited went no further: therefore it was not proper to be asked upon the *voire dire* to prevent the witness from giving evidence, but when sworn it might be put to him to weaken his credit. Every man is bound in justice to give evidence if required, and a promise of pardon can be looked on only as an inducement to do that which by law he ought to do according to the truth, and does not import that he is to give false evidence. They admitted the opinion of *Hale*, but observed, that all the other judges differed from him. The reason of the thing as well as the law, repelled the claim of putting the question. No question is to be asked a man upon a *voire dire* but to a fact that would take off his testimony; a promise of pardon made, upon condition that a man should give evidence, no more disables him from being a witness, than that the condition had been, that he should declare the truth; and if they should ask, whether he accepted a pardon on condition to give false testimony, he would not be bound to answer, because that would be to accuse himself of an act which is unlawful.

Hungerford and *Kettleby* in reply. Whatsoever person is produced in a court of justice for a witness, must be utterly unconcerned in point of *interest* in the event of the trial. *VIDE Ante, ca. 7. ca. 9.*

If a man produced as a witness to prove the debt upon the defendant, shall upon a *voire dire*, disclose that he is to have part of the money recovered, he cannot be examined. Now the promise of pardon is a greater bias than a promise of money. In a civil cause, the question is not, whether the witness be tempted to swear a truth or falsehood, but whether he be so far concerned in interest, that he ought not to be examined: and therefore the prisoner is intitled to have answer, whether *Lynch* hath the promise of a pardon, or any reward for the evidence he is to give against the prisoner; he is intitled to an *answer*, whether the question goes to his competency or to his credit.

Sir

Sir JOHN PRATT, C. J. EYRE, POWIS, and FORTESCUE ALAND, justices, held, that the objection went only to the *credit* of the witness, which must be left to the jury: but the promise of pardon was no objection either to his competency or his credit. It was not a proper question to ask on the *voire dire*, because if he had such promise it was either to speak the truth, or to speak a falsehood. If it were to give a just and true evidence, there was no harm in it; and if it was for speaking that which was not true, the witness was not bound to answer the question. The witness was examined. *VIDE* ca. 7. *Ante* 52. ca. 9. *Ante* 105. *Also, Vide index, words accomplice, pardon, reward, and the pages therein referred to.* 6 *St. Tr.* 257.

NOTE. A juror may also be examined on the *voire dire* as to his having a freehold. *The King, v. Francis.* 6 *St. Tr.* 59.

CHAPTER XI.

How far, and under what circumstances infants are admissible witnesses.

Rule the First.

CHILDREN under the age of fourteen years are *not*, as of course admitted as witnesses. But there is no time fixed wherein they are to be admitted: for the reason and sense of their evidence, is to appear from the questions propounded and the answers to them. Of this opinion is *Hale.* 2 *P. C.* 278.

HALE says, if an infant be of the age of fourteen years, he is as to this purpose of the age of discretion to be sworn as a witness; but if under that age, yet if it appears that he hath a competent discretion he may be sworn. 2 *Hales P. C.* 278.

And therefore, in some cases, an infant of nine years of age has been allowed to give evidence. For though under fourteen, yet if he be *intelligent*, or the nature of
the

the fact may allow an examination of one under that age he may be examined upon oath as a witness: as in case of rape or buggery; and the like may be in the rape of one under ten years, upon the statute 18 *Edm. ca. 6.*

Irisb (which makes the age of the girl carnally known twelve years). And the like hath been done in case of buggery upon a boy, upon the statute 25 *Hen. 8. ca. 6.* *Irisb* 10 *Car. 1. ca. 20. sess. 2.* 2 *St. at large* 81. And surely in some cases, one under the age of fourteen years, if otherwise of a competent discretion, may be a witness in case of treason. 1 *Hale's P. C.* 392. 2 *Hawk. P. C. ca. 46.*

And in the case of a rape committed upon an infant of such tender years, that she has not sufficient understanding to be admitted to give testimony on oath, it was formerly held, that the *information* which she gave to others of the fact and circumstances, might be given in evidence by those to whom she made the communication.

HALE objects to this mode of proceeding, and says, that if the party injured be an infant of such tender years, that in point of *discretion* the court sees it unfit to swear her, yet she ought to be heard *without oath* to give the court information, though singly of itself it ought not to move the jury to convict the offender, nor is it in itself a sufficient testimony, because *not upon oath*, without concurrence of other proofs that may render the thing probable. He then gives three reasons.

First, the nature of the offence, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed, though there may be other concurrent proofs of the fact when it is done.

Secondly, because the child complains presently of the wrong done to her, to the mother or other relations, their evidence upon oath shall be taken, yet it is but a narrative of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself, than to receive it at second hand from those that swear they heard her say so; for such a relation may be falsified, or otherwise represented at the second hand, than when it was first delivered.

But

But in both these cases, whether the infant be sworn or not, it is necessary to render their evidence credible, that there should be concurrent evidence to make act the fact, and not to ground a conviction singly upon such an accusation, *with or without* the oath of an infant. 2 *Hale's P. C.* 634, 635.

In *YOUNG, v. SLAUGHTERFORD, Trinity, 8 Anne*, at Bar, in an appeal of murder. Where a witness under twelve years of age being produced to give evidence against the appellee, was objected to; but *HOLT, C. J.* said, if he knew the danger of an oath he might give evidence, and that appearing he was admitted as a witness. 11 *Mod.* 228.

And, it is now settled, that if an infant appear, by answers propounded by the COURT for the purpose, to entertain sufficient sense of the danger and impiety of swearing falsely, she may be sworn and examined at any age.

Rule the Second.

But the *Infant* must be sworn—

This appears in the case of *Omichund, v. Barker*, on fir *Dudley Ryder's* quoting *Hale* as an authority, that a child incapable of considering the obligation of an oath might be sworn, was interrupted by *LEE, C. J.* who said it had been determined at the *Old-Bailey*, upon mature consideration, that a child should not be admitted as a witness without oath. And on the same occasion, *PARKER, C. B.* likewise said, it was so ruled at *Kingston* assizes before lord *RAYMOND*, where upon an indictment for a rape, he refused the evidence of a child without oath. 1 *Atkyns* 21. Vide *Ante* . *Post* .

The same rule was adhered to in the *KING, v. POWELL*, tried for a rape before *GOULD, J.* at the assizes of *York*, 1775.

The prosecutrix was an infant, between six and seven years of age; and upon the presumption of law, that a child under the age of seven years is incapable of understanding the nature of an oath, and is therefore incompetent to take it, she was admitted to give her evidence against the prisoner without being sworn.

The

The prisoner was acquitted: but the judge conceiving that by the laws of *England*, every conviction must be by legal evidence, and that especially in criminal cases no evidence can be legal unless it be *given upon oath*, he mentioned the case to the judges, and the majority of them were of opinion, that in criminal cases no testimony can be received except upon oath. *Leach. Cr. Ca. 2 Edit. 104. 3 Edit. 129.*

The case alluded to by lord chief baron PARKER, above cited, was the KING, v. TRAVERS, at *Kingston* assizes, Lent 1726. *Coram* RAYMOND, C. J. B. R.

The defendant was indicted at the preceding summer assizes, for a rape on a child little more than six years old. GILBERT, C. B. refused to admit the evidence of the child. At the same assizes an indictment was found against him for an assault, with an intent to ravish the same child, and this indictment coming to be tried before RAYMOND, C. J. an objection was again taken to her giving evidence, *viz.* that the girl being but seven years of age could not be a witness: that it had formerly been held that none under twelve years of age could be admitted: and that a child of six or seven years of age, in point of reason and understanding ought to be considered as a lunatic.

This objection was thus answered, that in *capital* cases which concerned life, this objection might be allowed; but that in *misdemeanors* only such a witness might be admitted; and the objection went only to the *credit* of the witness: and *Hale* says, that an infant of nine years old has been admitted. They also cited a case at the *Old-Bailey*, 1698, where on such an indictment before WARD, C. B. a child under the age of ten years, after the child having been examined about the nature of an oath, and giving a reasonable account of it, was sworn and examined.

RAYMOND, C. J. held, that there was no difference betwixt offences *capital* and *lesser* offences in this respect; and that a person who could not be a witness in *one* case could *not* in the *other*. The reason why the law prohibits the evidence of a child so young is, because the child cannot be presumed to distinguish between right and wrong.

Wrong. No person has ever been admitted as a witness under the age of nine years, and very seldom under ten. At the *Old-Bailey*, 1704, this point was thoroughly debated, in the case of one *Steward*, who was indicted upon two indictments for rapes upon children. The first was a child of *ten* years and *ten* months, and yet the child was not admitted as a witness, before other evidence was given of strong circumstances as to the guilt of the defendant, and *before the child had given a good account of the nature of an oath*. The second indictment was attempted to be maintained by the evidence of a child of between six and seven years of age, but it was agreed that a child so young could not be admitted as a witness, and she was rejected, without inquiring into circumstances to give her testimony credit. And it was merely upon the authority of *Hale's Pleas of the Crown*, where it is said that a child of ten years of age may be a witness. The other child was admitted to be a witness on the first indictment: the defendant was acquitted.
1 *Strange* 700.

In the *KING, v. BRAZIER*, the point appears determined. He was tried at *summer assizes*, for *York*, 1778, for a rape on the body of an infant under seven years of age.

On the trial the *information* of the infant was received in evidence against the prisoner; but as she had not obtained the years of *presumed discretion*, and did not appear to possess sufficient understanding to be aware of the dangers of perjury, she was not sworn.

The prisoner was convicted; but respited on a doubt whether evidence under any circumstances whatsoever, could be legally admitted in a criminal prosecution, except upon oath.

The TWELVE JUDGES to whom the point was referred were unanimously of opinion, that no testimony whatever can be legally received, except upon oath; and that an infant, though *under* the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, upon strict examination by the court, to possess a sufficient knowledge of the nature and consequence of an oath: for there is no precise or fixed rule as to the

time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court: but if they are found incompetent to take an oath, their testimony cannot be received.

NOTE. LEACH states, that it appears by a manuscript note of this case, that the child's evidence was not received at all; but that the mother and another witness gave evidence of what the child had said at the time. *Leach Cr. Ca. 2 Edit. 182. 3 Edit. 237. Vide the case of William York. Fost. 70. Gill. Law Ev. 144. Bull. N. P. 293.*

In the KING, v. PATRICK MURPHY, *Old-Bailey, sessions 1795*, indicted for a rape on a child of seven years old. RORKE, J. mentioned, that at *Gloucester assizes*, finding that the principal witness was an infant, who was wholly incompetent to take an oath, he postponed the trial to the following assizes, and ordered the child to be instructed, in the mean time, by a clergyman, in the principles of her duty, and the nature and obligation of an oath. At the next assizes the prisoner was put upon his trial, and the girl being found by the court on examination, to have a proper sense of the nature of an oath, was sworn, and upon her testimony the prisoner was convicted and executed. He added, that upon a conference with the other judges they approved what he had done. *Leach. Cr. Ca. 3 Edit. 482. Guilmot's Edit. Bac. Abr. vol. 2. p. 577. Natis.*

So in the KING, v. ROSE KELLY, *at a commission of oyer and terminer*, for the county of *Dublin, February, 1802*, before lord NORBURY, C. J. C. P. and WILLIAM SMITH, B. for the murder of Ann Murphy, aged five years.

Jane Murphy, a child of seven years old was produced as a witness.

Jonas Green, for the prosecution, informed the court that it having been found on examining the child, that she was ignorant of the nature of an oath, he had advised that a clergyman should be called upon to instruct her

her in a knowledge of the DIVINE BEING, the nature of an oath, and of rewards and punishments.

Mac Nally, for the prisoner, said, that so far from censuring, he thought the advice of *Mr. Green* extremely proper and legal, and mentioned the above case, where *RORKE, J.* had postponed a trial from one assizes to another, in order that an infant might be instructed in the consequences temporal and spiritual, of wilful perjury. He submitted, however, that as the objection went, in the first instance, to competency, of which the court were to determine, that the examination should not be by the counsel, but by the judge.

SMITH, B. examined the child. Do you say your prayers? *Yes, sir.* Who is it you say your prayers to? *My mother, sir.* You pray to God Almighty I suppose? *Yes, sir.* If you behave well and act as he would wish you to act, where do you suppose you will go when you die? *To Heaven, sir.* Do you suppose you would go to Heaven if you told a lie? *No, sir.* Where do you think God Almighty would send you if you told a lie? *To hell, sir.* If you were to swear a lie, which do you think you would go to Heaven or to hell? *To hell.* If we ask you any question just now, which will you tell the truth, or what is not the truth—will you tell the truth? *Yes, sir.* And you believe that God disapproves of telling lies? *Yes, sir.* And of course you will not tell a lie? *No, sir.* And you wish to do what will please God. *Yes, sir.*

The COURT thought there could be no objection to tendering this child an oath; and had no doubt but she had sufficient understanding.

Mac Nally—the object for consideration is her understanding. She has distinguished Heaven from hell in her answers; but to render her competent, she should shew a religious knowledge of the rewards and punishments of a future state. If she does that, no doubt she is a competent witness, and her credit must go to the jury.

SMITH, B. (to the witness.) Which would you rather conduct yourself so, as to go to Heaven or to hell? *To Heaven, sir.* She was then sworn, and gave strong and consistent evidence; which being corroborated by other witnesses, who also proved a chain of facts against

the prisoner, connecting the most conclusive guilt, and the prisoner calling no witness to fact or to character, she was convicted and executed the Monday following.

NOTE. By the laws of INA, a child of ten years old was allowed to be a witness in theft. *L. L. Ine lib. 7.*

CHAPTER XII.

On the competency of Aliens, Villeins or Bondsmen.

Rule.

IT is not a legal exception to a witness, that he is an alien, a villein, or a bondsman.

So ruled in the case of THOMAS HOWARD, duke of NORFOLK, 13 *Eliz.* for high treason before his peers. His grace objected to the competency of the bishop of *Rosse*, and one *Rodolph*; and quoted *Bracton*, to shew that witnesses must be *legates*, lawful men; and such, he said, strangers could not be, and such stranger charged him.

Catlin answered the duke, and it appears the JUDGES assented, that an alien, a stranger, and a bondsman, may be a witness, and *Bracton* was cited as the authority. 1 *St. Tr.* 113. Vide *Omichund*, and *Barter*.
Ante

CHAPTER XIII.

On the examination of persons Deaf and Dumb.

Rule.

A PERSON deaf and dumb, to whose mind has been conveyed the knowledge of a DEED, and a belief of rewards and punishments, may be examined as a witness,

ness, through the medium of a person capable of conversing with him by signs.

As in the KING, v. WILLIAM BARTLETT, *Old-Bailey, January sessions, 1786*, indicted for grand larceny.

John Ruston, a man *mutus et surdus a nativitate*, was produced as a witness on the part of the crown.

Martha Ruston his sister, being examined on the *voire dire*, it appeared that she and her brother, for a series of years had been able to understand each other, by means of certain arbitrary signs and motions, which time and necessity had invented between them. She acknowledged that these signs and motions were not significant of letters, syllables, words, or sentences, but were expressive of general propositions, and intire conceptions of mind; and that the subjects of their conversation had in general been confined to the domestic concerns and familiar occurrences of life. She believed, however, that her brother had a perfect knowledge of the tenets of christianity, and was certain that she could communicate to him true notions of the moral and religious nature of an oath, and of the temporal dangers of perjury.

The prisoner's *Counsel* objected, that although these modes of conveying intelligence might be capable of impressing the mind with some simple ideas of the existence of a God, and of a future state of rewards and punishments, yet they were utterly incapable of communicating any perfect notions of the vast and complicated system of the christian religion, and therefore the witness could not, with propriety, be sworn upon the holy gospels.

The difficulty of arraigning a man for perjury, whom the law presumes to be an idiot, and who is consequently incapable of being instructed in the nature of the proceedings against him, was also urged against the admissibility of the witness.

The COURT, present HEATH, J. over-ruled the objection, and *John Ruston* was sworn in the usual way, and
 “ *Martha Ruston* well and truly to interpret to *John*
 “ *Ruston*, a witness here produced, in behalf of the
 “ king, against *William Bartlett*, the prisoner at the bar,
 “ the questions and demands made by the court to the
 “ said

"said John Ruffon, and his answers made to them." The prisoner was found guilty. *Leach's Cr. Ca. 2 Edit.* 316. 3 *Edit.* 455.

So in the KING, v. ELIZABETH STEELE, *Old-Bailey, May sess. 1787.* It was held by the twelve JUDGES, that a prisoner mute by the visitation of God, on the fact being found by a jury, may be tried, found guilty, and sentenced. 3 *Leach Cr. Ca. 3 Edit.* 507. 2 *Hale B. Cr.* 317.

CHAPTER XIV.

On the disability of Idiots and Lunatics.

Rule.

SOME are disabled from being witnesses in regard of defect of intellectuals. A person of *non sane memory*, cannot be a witness while he is under that insanity; but if he have *lucida intervalla*, then under the time he hath understanding he may be a witness. But it is a difficulty scarcely to be cleared, what is the *minimum*, *quod* *he* disables the party, *Ca. Litt.* 6 b. 2 *Hale's P. C.* 278, *Vide 4 Black. 24. Leach Cr. Ca. 3 Edit.* 507.

CHAPTER XV.

On the Examination of Peers in criminal Cases.

Rule the First.

PEERS of the realm have no privilege, and where examined as witnesses either in civil or criminal cases, they are not exempted from taking an *oath*, but must be sworn in the same manner and form as other witnesses are. 3 *Keb.* 61.

For

For the respect which the law shews to the credit of a peer, does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratus*. 1 *Blackf. Com.* 402.

As in the case of sir THOMAS MEERS, v. lord STOURTON, in *Conc.* Sir Thomas Meers exhibited a bill against lord Stourton, and it was ordered, that lord Stourton should be examined upon interrogatories touching his title. It was objected, that he being a peer of the realm, ought to answer upon his honour only.

HARCOURT, lord-keeper, ruled, that where a peer is to answer to a bill, his answer put in upon his honour is sufficient; but where a peer is to answer interrogatories to make an affidavit, or to be examined as a witness, he must be upon his oath. 2 *Salk.* 512, 513. 1 *Peere Will.* 146. *S. C.*

In the earl of LINCOLN's case, in the Star-chamber, 1626, the justices of both benches (except Doderidge) being present, and all the barons of the exchequer, and a great assembly of lords of the privy council; it was moved—whereas sir Henry Fines, knight, had exhibited his bill in the star-chamber against the earl of Lincoln, for divers riots and other misdemeanors, and the earl of Lincoln had taken a commission forth to put in his answer upon oath in the country, and he offered before them his answer upon his honour, but would not put it in upon oath, because he was a peer of the realm; which matter being now reported by the commissioners, it was held by all the justices, who delivered their opinion *seriatim*, that the lords, in cases criminal, especially where the king is party, ought to put in their answer upon oath; and in all cases where they are to be witnesses, between party and party, they ought to be sworn. And the lord keeper said, *quod in judicio non creditur nisi juratus*, and that he had caused precedents to be searched, and had found divers since the first of queen Elizabeth, wherein peers of the realm having been impleaded in chancery, or star-chamber, or court of wards, have been always sworn: and he said, when a peer affirms any thing which is not true upon his honour, there is not any remedy; but if he affirms that which is false upon his oath, there is

is remedy by the 5 of *Eliz. ca. 9.* against perjury : wherefore they all resolved, that the earl of *Lincoln* ought to be sworn. All the lords and counsellors were of the same opinion, which they delivered *seriatim, nullo contradicente*, because it is *juramentum purgationis*, and not *promissionis* ; and princes are sworn to all their leagues and confederacies, which is called *juramentum confirmationis*, neither is it any diminution to the earl's honour to be sworn about that which he would not, should he be put upon his honour. *Cro. Car. 64. Hutton 87. Jones 1, 2, 154. Ord. Chan. 40. 2 Equit. Cas. ab. 14. pl. 4. Mitford's Plead. 9.*

Rule the Second.

And if a peer refuses to be sworn, and give evidence either before the grand or petit jury, he may be fined and committed for a contempt of court.

As in the *KING, v. lord PRESTON, Mich. 3 Will. & Mary, B. R.* His lordship was committed by the court of quarter sessions, for refusing to be sworn to give evidence to the grand jury, on an indictment for high-treason ; and was brought by *habeas corpus* into the king's bench.

HOLT, C. J. said, it was a great contempt, and that had he been there he would have fined him, and would have committed him until he had paid the fine. 1 *Salk.* 278.

CHAPTER XVI.

Of objections to the competency of Witnesses, on account of proximity to the party on trial.

Rule the First.

HUSBAND and wife being, in contemplation of law, as one and the same person in affection and in interest, can no more give evidence for one another in any case whatsoever,

Whatsoever, than for themselves; nor shall the one be admitted to give evidence *against* the other, even where such evidence only tends to criminate; and in collateral cases. 2 *Term. Rep.* 268.

As in the *KING, v. MARY GRIGGS*, *Mich. 12 Car. 2. B. R.* The defendant was indicted upon the statute of *Jac. 1. ca. 11. Irish 10 Car. 1. c. 21.* for that she, the 28th of February, 1653, was married to one *Nicholas Coates*, and that she afterwards, to wit, on the 10th of October, 1659, her first husband being then alive, married *Edward Cage*, &c.

Upon not guilty pleaded, the first husband was produced as a witness at the trial, to prove the first marriage; but the court refused his testimony, and said, that a wife could not be permitted to give evidence against her husband, nor the husband against his wife in any case excepting treason, because it might occasion implacable diffention, according to 1 *Inst. 6. b.* The prisoner was acquitted.

In the above case the court denied lord *Audley's* case to be law.

Baron GILBERT on this subject says, if they swear for the benefit of each other, they are not to be believed, because their interests are absolutely the same; and therefore they can gain no more credit when they attest for each other than when any man attests for himself. *Gilb. Evid. by Lists*, 252.

And it would be very hard that a wife should be allowed as evidence against her husband, when she cannot attest for him: such a law would occasion implacable divisions and quarrels, and destroy the very legal policy of marriage, that has so contrived it that their interest should be but one; which it could never be, if husbands were permitted to destroy the interests of the wife, nor could the peace of families be well maintained if the law admitted any attestation against the husband. *Ibid.*

BLACKSTONE coincides: Husband and wife, in trials of any sort, are not allowed to be evidence for or against each other: partly because it is impossible their testimony can be indifferent, but principally because of the union

of person: and therefore if they were admitted to be witnesses for each other, they would contradict one maxim of law, "*nemo in propria causa testis esse debet*," and if against each other, they would contradict another maxim, "*nemo tenetur seipsum accusare*." 1 Comm. 443.

Rule the Second.

Nor can the examination of the one, be made use of against the other.

But where either husband or wife have cause to demand sureties of the peace against each other, each may give evidence against the other of the cause on which such sureties are demanded. *Hutt. 16. Bull. Nisi Pr. 287. 1 Term. Rep. 69. 1 Burr. 635.*

The reason for these rules in respect to husband and wife, is founded in sound policy, and is to prevent the implacable dissention which might be caused by admitting witnesses for or against each other, and the great danger of perjury, from taking the oaths of persons under so great a bias, and extreme hardships of the case. *2 Hawk. Pl. Cr. ca. 46. 2 Hale P. C. 279. Co. Litt. 6. 112, 187. 2 Vern. 79.*

Rule the Third.

Neither is a wife bound to be sworn, or to give evidence against another in case of theft, &c. if her husband be concerned, though it be material against another and not directly against her husband. *1 Hale Pl. Cr. 301. Dalt. old Edit. ca. 111. New Edit. ca. 164. p. 543. 2 Term. Rep. 268. Post*

Rule the Fourth.

Where there are several joint defendants to one indictment, the wife of one of the defendants is not a competent witness to be examined for any of the others.

As in the KING, v. FREDERICK and TRACEY, *Trinity, 11 Geo. 2.* The defendants were indicted for a joint assault. At the trial it was insisted to examine the wife
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of the defendant *Tracey*, as a witness for the other defendant: but there having been material evidence against the husband, and it being a joint trespass, and impossible to separate the cases of the two defendants in the account to be given of the transaction, the chief justice refused to let her be examined. 2 *Sira.* 1095.

On those rules it has been determined, *ex parte, James, Hil.* 1719, that the wife of a bankrupt cannot be examined against her husband, touching his bankruptcy. She, by the common law, cannot be a witness for or against her husband; and though bankrupt statutes authorize the commissioners to examine the wife, touching any concealment of the goods, effects, or estates of the bankrupt, yet they do not extend to examine the bankrupt's wife, touching his bankruptcy, or whether he had committed any act of bankruptcy, or how and when he became a bankrupt. 1 *Peere Will.* 610, 611. 12 *Vin. Abr.* 11. pl. 28. S. P.

So in an information against two for perjury, and another for subornation of perjury, in swearing on the trial of an ejectment that a child was suppositious, the husband of one of the defendants was permitted to give evidence of the birth, but his evidence as to the subornation of perjury was rejected. 1 *Sid.* 377. 2 *Keb.* 403. *March.* 120.

The KING, *v.* the INHABITANTS of CLIVIGER, furnishes a determination on the point, and a retrospect to all the authorities of weight upon the question.

Two justices removed, by an order, *James Whitehead*, otherwise *Shepherd*, and *Margery* his wife, from the township of Anlegark to Cliviger, both in the county of Lancaster; on an appeal to the sessions, that order was confirmed, subject to the opinion of the court on the following case:

As to so much of the order as respected the settlement of *Margery*, therein named to be the wife of *James Whitehead*. The respondents proved the marriage of the paupers, *James* and *Margery*, on the 6th of September, 1786, and then closed their case. The appellants insisted, that *James Whitehead*, the pauper, had a former wife, *Ellen*, living at the time of his marriage with
Margery,

Margery, and called *James Whitehead* to prove it, who swore that he never was married to the said *Ellen*. The appellants then offered to call the said *Ellen*, stating her to be the lawful wife of the said *James Whitehead*, to contradict what he her supposed husband had sworn; and to swear that she was his lawful wife; but the sessions under the circumstances refused to receive her evidence. The appellants then went into evidence of cohabitation between *Ellen* and *James*, for a period of three or four years; of declarations and acts of *James* acknowledging *Ellen* to be his wife, and amongst others an indenture of apprenticeship, dated 24th of August, 1785, was proved by the said *James* and the said *Ellen*, therein described to be his wife, whereby was bound out apprentice one *Thomas Williams*, the son of the said *Ellen*, by one *Joseph Williams* formerly her husband, but then deceased.

The question referred to the court is—whether the said *Ellen* was a competent witness or not.

S. Heywood and *Topping* in support of the order of sessions. The real question is, whether a wife is a competent witness, even in the case of third persons, to prove her husband guilty of bigamy? besides the objection of her being interested in the question which was put to her, in as much as she was called to prove, that a person whom she called her husband was liable to her debts and for her maintenance.

The policy of the law will not permit husband and wife to give evidence tending to the crimination of each other. Here the evidence of the wife went to charge her husband with bigamy.

The broad rule is laid down in *Buller's Nisi Prius*, where it is said, that husband and wife cannot be witnesses for each other, because their interests are absolutely the same, nor against each other, because it is contrary to the legal policy of marriage. *Nisi Pr.* 286.

And on this latter ground lord HARDWICKE, in the case of *BARKER, v. DIXIE*, refused to let the plaintiff's wife be examined, although it was with the defendant's consent. *Rep. Temp. lord Hardw.* 264.

So in *Coke Littleton*, it is said to have been resolved by the justices, that a wife cannot be produced against her husband, for it might be the cause of implacable discord and dissention between them, and the means of great inconvenience. *Co. Litt. 6. b. Sir T. Raym. 1. 2 Stra.* 1095. *Ante*

The case of *BROUGHTON, v. HARPUR*, 13 *Will. 3.* is expressly in point, there in ejectment, tried before *GOULD*, justice, the lessor of the plaintiff made title as son and heir of *J. Jacques* and *Hannah* his wife, in right of *Hannah*. The defendant offered to call a woman to prove that *J. Jacques* was then living, was married to her before he was married to *Hannah*, and she was accordingly admitted. However, a verdict was found for the plaintiff. But the same case upon the very same title, between the same parties, came on again at the following spring assizes before *HOLT*, chief justice, 1 *Anne*, when this woman being again offered to the same fact, he rejected her: but the defendants proved it by other evidence and obtained a verdict. 2 *Lord Raym.* 752.

It does not appear from the report, whether the cause came on the second time upon a new trial granted by the court, though it very probably did; but at any rate it must have been on mature deliberation, and a perfect conviction of the impropriety of receiving such evidence, otherwise lord *HOLT* would not have ruled as he did so recently, after a contrary determination on the very same point, in the same case, by another judge.

In *BENTLY and COOK, Trinity*, 24 *Geo. 3.* in this court the same principle has been strongly recognized. There in an action by the plaintiff as *feme sole*, for goods sold and delivered, the defendant called the husband as a witness, to prove that she was a married woman, and he was admitted and the plaintiff was non-suited. On a motion to set aside the non-suit, the majority of the court thought that he was not admissible, on the ground of policy; *BULLER*, justice, doubted at first upon the ground, that the husband was not interested in that case, but he afterwards acceded to the opinion of the court, upon the broad ground adopted by them, of the impolicy of
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of permitting husband and wife to give evidence for or against each other.

It is plain, that *interest* alone, in the event of the suit, is not the true criterion in cases of this sort. Where a person becomes a bankrupt, all interest ceases; and if this kind of objection had been founded merely on that ground, a wife would have been a good witness to prove effects the property of her husband before his bankruptcy, but it has been ruled otherwise, and therefore it was necessary to have an act for that purpose. *Brownl. 47. Ante . Stat. 21 Jac. 1. ca. 19.*

So that the argument which may be urged on the other side, that the husband could not be affected by this evidence, in as much as it could not be made use of on any other occasion, cannot have any weight; for if it tends to *prejudice* him in any *degree* that is sufficient. It would certainly have raised impressions against him; and, indeed, it would have been the duty of the justices to have committed him after having heard it.

There may possibly be some cases where a wife may give evidence on behalf of third persons, which may obliquely affect her husband, but certainly none where it tends to impute any crime to him. In trover for goods, a wife would not be permitted to say her husband *stole* them and gave them to the defendant. But a woman may prove the legitimacy of her child, because there is no *interest* to herself, and no *crime* alledged against her husband.

In *HALE* it is laid down, that a woman is not bound to give evidence against another in case of a theft or any other crime, if her husband be concerned, though it be materially against another, and *not* directly against her husband. *1 Pl. Cr. 301. Ante .*

Now if the charge could not be obliquely made in one instance, there is no reason why it should be in another; and there is no instance in which the wife could prove the same fact in an action which she could not do in an indictment against a third person, and there is no reason for any distinction. Neither is there even the plea of *necessity* in this case, for the same fact might have been

been established by other evidence as by the register of marriage.

Bearcroft, Cockrell, and Johnson, contra. The objection goes to the *credit*, not to the *competency* of the witnesses. The courts have leaned very much to this rule of late years, particularly as more conducive to the ends of justice. *Abrahams and Bunn. 4 Burr. 2251. Ante* .

In order to form a right opinion upon competency, it is necessary to consider who were the parties ; what was the matter in issue, and the question put to the witnesses. The parties to the cause were the two several parishes ; the matter in issue was a question of settlement ; which differs this from all other cases, for greater latitude is here allowed. The parties themselves whose settlement is in question, have ever been allowed as witnesses, and therefore the parish of Cluiger had a right to the testimony of this woman. That being the case, and neither the husband nor wife being in any degree interested in the event, the simple question is—whether a woman is a competent witness to prove her marriage ? There are many cases to that effect, and it has always been the constant practice to call husband and wife to prove that fact. *Bull. N. P. 287.*

It would be a strange absurdity indeed, if the event of a cause were decided by the circumstance of calling this or that person first, whether by accident or design. It might be turned to very bad purposes to encourage such a distinction. Great inconveniencies would arise to third persons, if they were to be struck out from receiving the benefit of another's testimony by such means. The circumstance is likely to occur frequently in the case of wills. In case of an indictment for bigamy, the first wife's evidence is not admissible, because it goes to charge her husband directly ; but here nothing that the woman could say could affect her husband ; no prosecution could be grounded on her testimony ; neither was there any benefit to herself. And as to its being the duty of the justices to commit the husband in case of such evidence having been given, it is no objection to third parties proving their case, that the justices may interfere in another shape. In the case of *BENTLEY, v. COOK*, where
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the husband's testimony was held to be inadmissible; he was clearly interested. One of the two cases cited from lord *Raymond*, seems indeed to support the objection; but that can have no weight, for at any rate it is only an opinion thrown out at *Nisi Prius*, upon evidence which was unnecessarily tendered; for the same fact was established afterwards by other means: and besides it is contradicted by another case, where the facts were similar, decided the other way. As to the other objection, there is no such rule as that a party may not call a second witness to contradict his first. It is in every day's practice to do so. Sometimes, indeed, where several witnesses have been called by one party, who give evidence against him, the judge will signify his disapprobation to his calling any more; but it would be hard indeed, if the rights of parties in a cause were to depend upon the first witness whom they happened to call. It would be an incitement to perjury, as such a witness would be worth gaining at any rate.

ASHURST, J. There is no doubt, but that husband and wife may prove their own marriage on a question of settlements. But this case rests upon particular circumstances. A marriage in *fact* had been proved with one woman—the question was, whether she was the pauper's lawful wife? then another woman was called to prove that she had been before married to him, and was in truth his lawful wife. That creates the doubt, whether it was competent to the wife to prove, that her husband had been twice married. Under these circumstances, she was not a competent witness to that purpose. It has been long established, that the question of settlement raises no *interest* in the parties whose settlement is in dispute, therefore the consideration of *interest* is out of the case. For though the evidence of the woman would have gone to shew that her husband was liable to maintain her, yet that objection would have gone to her *credit* and not to her *competency*, because it would be of no avail on any other trial. But the ground of her competency arises from a principle of public policy, which does not permit husband and wife to give evidence that may even *tend to criminate* each other. The objection is
not

not confined merely to cases where the husband or wife are directly accused of any crime; but even in collateral cases, if their evidence tends that way, it shall not be admitted. Now here the wife was called to contradict what her husband had before sworn, and to prove him guilty of perjury as well as bigamy, so that the *tendency* of her evidence was to charge him with two crimes. However, though what she might then swear could not be given in evidence on a subsequent trial for bigamy; yet her evidence might lead to a charge for that crime, and cause the husband to be apprehended. In that point of view, therefore, her testimony ought not to have been received, because it is an established maxim, that husband and wife shall not give evidence to criminate each other.

Thus far upon principle.—But besides the *Nisi Prius* case before, lord HOLT seems to have great weight: for though there is the opinion of another judge the other way, yet the one decision immediately follows the other, and being between the same parties, and upon the same title, the first might have become a matter of discussion between the judges; and probably on the second trial, Mr. justice Gould would have ruled in the same manner as lord Holt did. Upon the whole, the objection is well founded.

GROSE, J. In this case the wife was called professedly for the purpose of proving that her husband was guilty of bigamy. The question is—whether she was a competent witness to prove that fact.

The distinction between competency and credit is by no means accurately settled; in many of the books the shade between them is so light, that the boundaries of either can hardly be perceived. But in all the books which treat of evidence, there are certain technical rules laid down, which are highly beneficial to the public, and ought not to be departed from. Some of these relate to husband and wife; and we find the general rule as to them to be founded, *not* on the ground of *interest*, but of *policy*; by which it is established, that a wife shall not be called to give testimony in any degree to criminate her husband. Lord Hale says, she shall not be called

called even *indirectly* to criminate him, and that rule seems to have governed all the decisions from that time to the present. *Vide Rules. Ante*

The case in lord RAYMOND is very much in point. It is not merely to be considered one *Nisi Prius* case contradicted by another. The report shews, that the second cause came on upon a new trial, for it says, "the same cause" came on to be tried before *Holt*. On the first trial the question was considered by *Gould*, justice, on the ground of *interest*, and considering it merely in that light, he might have done right in over-ruling it? but the true and best ground of objection is not that of *interest*, but is founded on the political inconvenience of causing dissensions in families between husband and wife; and so it is put by lord *Hale*. In *Hawkins's Pleas of the Crown* the objection is also considered in the same view, and my lord *Hardwicke* adopted it in the case before him. Since that time, in *Bentley, v. Cook*, the determination of the three judges was on the broad ground of the public inconvenience, arising from the admission of such testimony. Mr. justice *Buller* doubted at first in that case, because he thought there was no *interest* in the party; but on further consideration he gave into the opinion of the other judges, upon the general principle which governed them, as it tended to prevent dissensions in families.

Then he applied the circumstances of this case to that principle, and concurring with Mr. justice *Asbursht*, the order of sessions was confirmed.

DAVID, v. DINWOODY, *Easter*, 32 Geo. 3. B. R. seems completely to settle and conclude this question of competency.

This was an action by the executrix of a surviving trustee, under a marriage settlement of *J. Lewis*, in 1780, by which certain household goods, mentioned in a schedule annexed to the deed, were settled to the sole and separate use of *Lewis's* wife; and it was brought against the defendant, sheriff of *Monmouthshire*, to recover back the value of some of those articles which had been seized and sold by him, under an execution against *Lewis*.

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At the trial, *J. Lewis* was called as a witness, to prove the identity of the goods: the defendant's counsel objected to his competency, and it was said that he was interested; to which it was answered, that he came to speak against his interest, for that if these goods, which had been seized, were not his own, and could not be taken to pay *his* debt, he would be liable afterwards. Whereas, if they could be taken in execution, his debt would be discharged.

GROSE, justice, admitted the witness, but reserved the point.

Adair, serjeant, having obtained a rule to shew cause why the verdict for the plaintiff should not be set aside, and a new trial had,—

Bower and *Lane* shewed cause against it, arguing that the husband was a competent witness in this cause, because he was not interested. The rule with regard to admitting husbands and wives as witnesses, is accurately laid down in the law of *Nisi Prius*, where it is said, that husband and wife cannot be admitted as witnesses for each other, because their *interests* are absolutely the same; nor against each other, because *contrary* to the legal policy of marriage. *Bull. N. P.* 286.

This rule is warranted by the cases. *Broughton, v. Harpur*, 2 lord Raym. 752. *Bentley, v. Cook*, cited in the *King, v. Cliviger*, 2 Term. Rep. 265. *Ante* . went on the ground of interest; and 1 Brownl. 47. and the *King, v. Cliviger*, 2 Term. Rep. 263. *Ante* . on the policy of marriage.

Then the only ground on which husbands and wives are rejected, when speaking for each other is interest, but here the interest was the other way. And if the ground of interest be laid out of the case, it was not against the policy of marriage to admit this husband; for this was an action against the sheriff, in which the wife's interest does not appear at first to be affected; and if the court take notice of the situation in which the husband stood, they must see that the interest of the wife was sole and separate from that of her husband. In *Williams, v. Johnson*, to an action against the daughter's husband for wedding clothes, the defence was, that the

goods were furnished on the credit of the father; to prove which the mother, who was present when the goods were bought, was called to charge her husband, and allowed. 1 *Stra.* 504.

LORD KENYON, chief justice, (stopping *Adair* and *Caldecott, contra,*) independently of the question of interest, husbands and wives are not admitted as witnesses, either for or against each other: from their being so nearly connected, they are supposed to have such a bias upon their minds, that they are not permitted to give evidence either for or against each other.

BULLER, justice. It is now considered a settled principle of law, that husbands and wives cannot in any case be admitted as witnesses, either for or against each other. *Rule absolute.*

Rule the Fifth.

But though a wife, in civil or in criminal cases, cannot be received as a competent witness against her husband, yet in a criminal case, where *she* is the *party* *grieved*, and on whose person the crime is committed, she is a competent witness against her husband; and of course her examinations may be received against him; and this rule is grounded on evident necessity. *Vide Rule 2. Ante*

As in the *KING, v. MERVIN*, lord AUDLEY, earl of CASTLEHAVEN, before the LORDS, *April 16, 7 Car. 1.*

There were three indictments found at Salisbury, in WILTSHIRE, against the earl, before HYDE, C. J. B. R. RICHARDSON, C. J. C. P. and DERHAM, B. justices of assize for that circuit, and special commissioners in that matter. *Rushw. Coll. vol. 2, p. 93—101. Hutt. 115.*

One indictment was for a rape upon his own wife, the countess of *Castlehaven*, by holding her by force, while one of his minions forcibly, and against her will, had carnal knowledge of her: so that he was indicted as *presens auxilians* and *confortans*; and therefore a principal. The other two indictments were for buggery with *Lau-rence Fitzpatrick*, his lordship's footman.

Previous

Previous to the trial, several questions were proposed to the JUDGES, by sir *Robert Heath*, attorney-general, among which was—"Whether the wife in this case, " might be a witness against her husband for the rape?" And the JUDGES answered, "She might; for she was " the party wronged; otherwise she might be abused. " In like manner a villein (vassal) might be a witness " against his lord in such cases." 1 *State Tri. Harg.* 387.

LORD AUDLEY, in his defence on trial, desired "to " be resolved, whether his wife is to be allowed to be a " competent witness against him, or not?" And the judges, eight being present, resolve, "That in civil cases " the wife may not; but in a criminal case of this nature, where the wife is the party grieved, and on " whom the crime is committed, she is to be admitted a " witness against her husband." The countess was accordingly sworn, proved the perpetration of the rape, by the assistance of her lord, and he was convicted and hanged.

HALE appears to consider this case as law, and cites it as a precedent. 1 *Hale Pl. Cr.* 301. *Hutt.* 116. In *Mary Griggs* case, the case of lord *Audley* is denied to be law. *T. Raym.* 1. *Ante*.

Baron GILBERT says, in the case of lord AUDLEY, where the husband was charged to have assisted to the rape of his wife, the wife was allowed a witness, because it was a personal force done to her; and of such secret violence, there could be no other proof but by the oath of his wife. But (on the whole) this piece of law hath since been exploded, that in a personal wrong done to the wife, the wife may be evidence against the husband, because it may be improved to dreadful purposes, and must be cause of implacable enmity, if the husband chance to be acquitted. *Gilb. Law of Evid. by Loft*, 253. *T. Raym.* 1. 2 *Keb.* 403. pl. 8.

LOFT cites a recent case in support of this opinion—a case singular, and at least equally horrible and unnatural as that of the earl of *Castlehaven*. At the Summer assizes of *Bury*, 1784, the judge recommended in his charge, that a bill then before the grand jury should not be

be found, if unsupported by any other evidence than the wife of the party charged: since otherwise a cause very peculiarly unsuitable to be brought, without effect, before the public ear, would come to trial with a legal necessity of the prisoner being discharged from the indictment, for want of evidence *competent* to go to the jury. *Ibid.*

In this direction there was a chaste and a moral policy—it was an unheard of crime. Among the ancient Romans, there was no punishment for parricide; the offence being considered as an impossibility, and the English judge was right in suppressing the promulgation of an offence, which most probably will never again shock the feelings of humanity.

BLACKSTONE supports the opinion of the judges in lord *Castlehaven's* case. After laying down the incompetency of husband and wife in civil and criminal cases, he says, “but where the offence is directly against the person of the wife, this rule has been usually dispensed with.” And he cites lord *Castlehaven's* case. 1 *Com.* 443.

So in the *KING, v. AZIR. Nisi Prius. Trinity, 11 Geo. 1.* On an indictment against the husband for an assault upon his wife, lord RAYMOND, chief justice, allowed her to be a good witness for the king: and cited lord *Audley's* case. 1 *Stra.* 633.

And in the *KING, v. DOCTOR MARRIOTTE. GEORGE,* recorder of Dublin, (now baron) allowed the wife to give evidence of an assault and battery, committed on her when alone in her chamber, by her husband. 1792.

Rule the Sixth.

In murder, the dying declarations of husband or wife if in *extremis*, and conscious of approaching dissolution, may be received in evidence: and after a mortal wound is given, the dying declaration is evidence, although the party did not express any apprehension of immediate death; if the jury be of opinion, from the circumstances of the case, that the deceased must have felt such

an apprehension. *Woodcock's case*, *Leach Cr. Ca.* 3 Edit. 363. *Dingler's case*, 638. *Post*.

Rule the Seventh.

It appears also to be a legal rule, that the examination of a party murdered, whether husband or wife, taken judicially by a magistrate, pursuant to the *statutes of Philip and Mary*, may be read in evidence against *husband or wife*. And if not taken judicially—*Query*, may it not be read as a dying declaration? Vide *the cases cited to the preceding rule*.

Rule the Eighth.

The affidavit of the wife is permitted to be read as evidence, on an application to the court of king's bench for an information against the husband to take her away by force after articles of separation, and she is afterwards a competent witness against him on the trial; for it would be strange to permit her to be a witness to ground a prosecution upon, and not afterwards to be a witness on the trial. *Bull. N. P.* 287. *Lady Lawley's case*.

And in the KING, (at the prosecution of lady STRATHMORE) *v.* ANDREW ROBINSON BOWES. *Easter*, 27 Geo. 3.

Articles of the peace having been exhibited against the defendant, by the countess of *Strathmore*, his wife, he entered into security for his good behaviour for a twelvemonth. Soon after the expiration of the time, the defendant, with others, carried off his wife by force and confined her, she was brought up by *habeas corpus*, exhibited fresh articles of the peace against her husband, and he was not only held to bail himself in 10,000*l.* and two sureties of 5000*l.* each, but an information was granted against him, on which he was tried, convicted, and punished, by fine and severe imprisonment. 1 *Term. Rep.* 698. Vide *Lord Ferrar's case*. 1 *Burr.* 635. *Same point*.

Rule

Rule the Ninth.

A wife may give evidence against a prisoner, although she entertain a hope, that the conviction of such prisoner will tend to procure the pardon of her husband, previously convicted of felony; for this influence only affects her *credit*, and not her *competency*.

As in the KING, *v.* MARG. CAROL. RUDD, *Old-Bailey, December sessions, 1775*, before ASTON, J. BURLAND, B. and GLYNN, *serjeant and recorder*, on an indictment for forgery.

Henrietta Alice Perreau, the wife of Robert Perreau, who was then under sentence of death, for having feloniously uttered a bond knowing it to be forged, was produced as a witness for the crown.

She was sworn on the *voire dire*.

Davy, serjeant, of counsel for the prisoner, asked her "Whether she did not apprehend that Mrs. Rudd's conviction would contribute to procure her husband's pardon?" to which she answered, "If Mrs. Rudd is found guilty, I suppose it will. I hope it may be the means of procuring Mr. Perreau's pardon."

Davy submitted to the court, that Mrs. Perreau was not a competent witness, after having told the court she *hoped* the conviction of the prisoner might be the means of obtaining her husband's pardon. No person can be a witness in any civil action or criminal prosecution, who is interested in the event of the suit. A person whose bond or note is forged shall not be admitted to prove it a forged instrument, if in consequence of his testimony, the validity of the instruments may be any way affected by the conviction of the defendant. If Robert Perreau was a co-defendant with Mrs. Rudd, Mrs. Perreau could not be admitted to give testimony: for the wife is not competent to give evidence for her husband or the co-defendant of her husband. *Vide Rule 4. Ante*

Cowper, (*Thomas*) same side. The law requires that every witness shall be totally indifferent as to the event of the cause. When a witness *conceives* himself interested in the event of a prosecution, though mistaken, his mere *imagination* of being interested, is as strong an objection

objection to his competency as if he had been really interested therein. For the wisdom of the law anxiously endeavours to exclude every witness who has the least bias on his mind, from whatsoever source that bias may spring; and to render a witness superior to all objection, he must be totally indifferent upon the subject on which he is about to be examined, and altogether disinterested in the event of the prosecution. The bias on the mind of a wife in favour of her husband, or a husband in favour of a wife, is the strongest the law takes notice of; and for Mrs. *Perreau* not to be impressed by that bias; not to be warped by the ties of conjugal affection; not to come with more solicitude and anxious wishes for her husband, than for the prisoner, would be almost criminal apathy. Whether her conception or hope, that the conviction of Mrs. *Rudd* will contribute to her husband's pardon, be well or ill founded, will not alter the case an iota: she has declared it is her opinion, that her husband's innocence will appear in consequence of Mrs. *Rudd*'s conviction, and that she hopes his pardon will be the consequence. It is then through the medium of Mrs. *Perreau*'s testimony, which is to contribute to the conviction of Mrs. *Rudd*, that her husband's life is to be saved—and if that is not a clear, a decisive, and a positive interest, it is impossible to define what a positive interest is. If upon the trial, when it was an equal chance whether he would or would not be under sentence of death, his wife could not be a witness for him, is he, when under sentence of death, to be rescued from that unfortunate situation by her testimony? does the influence cease and become an objection to her *credit* only? and not to her *competency*? In civil cases, if an objection be taken to a witness, who only imagines he has an interest, though he really has none, such objection is invariably allowed to prevail. If a master, in defending his servant, imagines that, in point of honour, he ought to pay his costs, his testimony is rejected. Mr. *Cropper* cited another case, and concluded in the words of lord MANSFIELD, "It is not the office of courts of law to consider how far the minds of men may be capable of resisting temptation, but to take the most anxious

"care that they shall not be exposed to any temptation
"at all."

Lucas, for the crown, said, the argument used went to shew the degree of *credit*, rather than to destroy the competency of the witness. If the doctrine of incompetency prevailed to the extent contended for, it would be impossible to convict on any crime, or any certainty of guilt. It would render incompetent every person robbed expecting a restoration of property; every prosecutor intitled to a reward depending on conviction; but no objection can be made on that ground. An accomplice not sure of his pardon, yet hope it he must, and yet such accomplice is a competent witness. The interest of a witness to raise incompetency, must be a direct and immediate interest; and that interest must exist and appear clearly before the competency of a witness can be destroyed.

COURT. The reason assigned by Mrs. *Perreau* for her hope, that the conviction of the prisoner might tend to procure her husband's pardon, appears to be substantially founded on an idea that such facts may appear in evidence on the trial, as will shew that her husband is innocent, and induce the crown to extend its mercy to him. She apprehends that Mrs. *Rudd's* guilt will be manifested: but it does not follow, that if the jury should be of opinion that Mrs. *Rudd* is guilty of the present charge, *Robert Perreau* must be innocent of the charge of which he has been convicted; or that her conviction will so soften the complexion of his guilt, as necessarily to induce the crown to pardon him; and therefore the hope she has expressed, is not sufficient to render her an incompetent witness; for the bond, for the uttering of which *Robert Perreau* was convicted, is not the same bond for the forging of which Mrs. *Rudd* is to be now tried.

The observation, that if *Robert Perreau* were a co-defendant with the prisoner, Mrs. *Perreau's* evidence would be inadmissible, is well-founded, for a wife cannot directly, nor indirectly, give evidence either for or against her husband; but it does not apply to the present case. *Vide Ante*

The

The cases put by Mr. *Lucas* are apposite to the present case. The accomplice hopes for mercy, yet notwithstanding his disclosure, he may be indicted and convicted. In prosecutions where there are rewards, a witness expecting the reward, on conviction, may be considered interested in the event of the cause, yet he is competent. So are criminals, admitted under the statutes of king *William* and queen *Anne*, because they are not intitled, unless they convict. It would be against the rules and principles of law, if such persons by giving their testimony, were considered as interested in the event of the prosecution. They are in the same situation, in appearance, who, although they do not convict, are intitled to a pardon. But the case of a prosecutor, declaring that he hoped by the conviction of a prisoner to obtain restitution of his property, is precisely parallel to, and decisive of the present point. Whatever therefore Mrs. *Perreau's* hopes may be, yet as the satisfying of them does not necessarily follow upon the conviction of Mrs. *Rudd*, the court is of opinion, that she cannot be considered as *interested* in the event of the prosecution, so as to exclude her from giving her testimony therein; for that although the objection goes very strongly to affect her *credit*, of which the prisoner will have all the advantage, it leaves her *competency* undestroyed.

Mrs. *Perreau* was examined—Mrs. *Rudd* was acquitted; the jury bringing in their verdict “according to the evidence before us—*Not Guilty*.” *Leach Cr. Ca.* 2 Edit. 110. 3 Edit. 133.

Rule the Tenth.

But though a wife *de jure* cannot be a witness for or against her husband, yet a wife *de facto* may.

As if a woman be taken away by force and married, she may be a witness against her husband, indicted on the statute against the stealing of women, for a contract obtained by force, hath no obligation in law. *Ex vi injusta non oritur contractus.* *Gilb. La. Evid. by Loft*, 254. 2 *Hawk. P. Cr. Ca.* Vide *Stat. 3 Hen. 7. ca. 2. Anno* 1486.

BLACKSTONE assigns another reason for this rule. In this case he says, the woman can with no propriety be reckoned his wife, because a main ingredient, *her consent* was wanting to the contract: and also there is another maxim of law, that no man shall take advantage of his own wrong, which the ravisher here would do, if by forcibly marrying a woman, he could prevent her from being a witness, who is perhaps the only witness to that very fact. 1 *Comm.* 444.

As in the KING, *v.* lady FULWOOD, and others, *Mich.* 13 *Car.* 1. *B. R.* indicted on stat. 3 *Henry*, ca. 2. SARAH COXE, the heiress, who was carried away, gave evidence against Roger Fulwood, who had married her by *duress*, which the court construed to amount to force, and the defendant was found guilty. *Cro. Car.* 482, 488, 489.

So in the KING, *v.* BROWN, *Trinity*, 25 *Car.* 2. the same point was resolved by all the judges of the king's bench, for these reasons,

First, because otherwise the statute would be vain and useless, for possibly all that were present were of the offender's confederacy. *Secondly*, the marriage, though a marriage *de facto*, yet, if it were effected by a continued act of force, was not a marriage *de jure*, for it was dissolvable by divorce, unless ratified by a subsequent free cohabitation. *Thirdly*, and principally because it was *flagrante crimine*; for the child was taken away upon the *Thursday*, married the *Friday*, and seized by the guardian the next day, before they had lain together, and the force was all that while continuing upon her. *Fourthly*, there were other witnesses, that proved the first taking away by force against the child's will, though there were no witnesses to prove the marriage forcibly but *herself*, who expressly swore that she was married against her will; upon all which circumstances it was ruled, that she should be examined in evidence, and the credibility of her testimony left to the jury. But, most were of opinion, that had she lived with him any considerable time, and assented to the marriage by a free cohabitation, she should not have been admitted as a witness against her husband. The prisoner was convicted, had judgment of death, and was executed. 1 *Hale P.*

C. 301, 302. 1 *Vent.* 243. 3 *Keb.* 193. 5 *St. Tr.* (Harg.) 6, 8.

But in the case of *PERRY*, on an indictment for a forcible marriage, the wife was admitted a witness for her husband, to prove that the elopement and marriage were voluntary and not forced, *Bristol assizes*, 1794.

Rule the Eleventh.

In the case of high treason the wife is admitted as evidence against her husband, because this is for the public safety, which is to be preferred before the interest or peace of private families; and the ties of allegiance are more obligatory than any relation whatever. *Gill. La. of Evid. by Loft*, 252.

Cari sunt parentes, cari liberi, propinqui familiares; omnes omnium caritatus patria una complexa est: pro qua quis bonus dubitet mortem oppetere si ei sit profuturus? De office, Ed. Davis, 17.

But the wife is not bound to discover her husband's treason, though the son is. *Brownl.* 47.

In the case of *MARY GRIGGS*, the above rule is laid down. *T. Raym.* 1. *Ante*

So in *ANNESLEY, v. the earl of ANGLESEY. Excheq. Ireland*, 17 *Geo.* 2. It is said, the only instance wherein a wife can be examined against her husband is in high treason. 11 *St. Tr.* 402. *in note*.

NOTE. In the researches I have made I have not discovered any trial for treason, where the wife was examined as a witness against her husband, on a charge of high treason. M. See *Omichund, v. Barker. Ante*

Rule the Twelfth.

All relations, except husband and wife, as parents, children, &c. are competent to give evidence against each other. *Co. Litt.* 6.

And dreadful as the idea is, yet even in capital cases, a parent may be called on to give evidence against a child, a child against a parent, or children of the same parents against each other!

PENCHELE,

PENCHELE, *v.* PENDRELL, *Hilary*, 5 *Geo.* 2. before lord RAYMOND. This was an issue out of chancery, to try whether the plaintiff was heir to T. O. The marriage and birth being admitted, by order, the mother was called on to prove that her husband had access to her. 2 *Str.* 925. 3 *P. Wills.* 276.

So in LOMAX, *v.* LOMAX, before lord HARDWICKE, the mother, as a witness for her child, was admitted to prove her marriage. *Bull. N. P.* 287.

And in an ejectment against *Sarah Brodie*, at *Hereford*, WRIGHT, J. admitted the father to prove the daughter legitimate, her title being as heir to her mother. *Ibid.*

So in the KING, *v.* the MAYOR and BURGESSES of *Oakhampton*, *Trinity*, 25 and 26 *Geo.* 2. 1752. Mandamus to admit J. Stotus to his freedom, as being the eldest son of a freeman. The question was, whether the father was an *admissible* witness to prove a custom in the corporation in favour of his son.

LEE, C. J. The person to whom the remainder of an estate is, after the determination of a particular estate, limited by will, cannot be admitted to prove the will, because he has, although it be remote, a vested interest in the matter in question. But it hath been always holden, that the son of the person to whom the particular estate is devised by will, may be permitted to prove the will, because although he may be under a bias, he has not a vested interest in the question.

Mere relationship, how near soever the relation may be, does not go to the competency of a witness, unless there be a *vested interest* in the matter in question. The bias which the father is presumed to be under, in giving testimony in favour of his son, does certainly go to his *credit*; but a father is in *all* cases a *competent* witness for his son, if he have not a vested interest in question. 1 *Wils.* 332. *Sayer* 45. *S. C.*

NOTE. Among the many crown prosecutions produced by the rebellion in Ireland, 1798, there was not an instance where any near relation was called upon as a witness, to give evidence on the part of the prosecution; but on the part of the prisoners, relatives in every degree, father, mother, brother, sisters, &c. were produced

duced by the prisoners, and examined without objection to their competency.

CHAPTER XVII.

Of the admission of Approvers as witnesses for the crown, and of Accomplices, and the credit due to their evidence, when examined on trial.

TO understand the rules of evidence which apply to accomplices, it is necessary first to be acquainted with the ancient law respecting approvers.

APPROVER, or PROVER, *approbatur*, is one that confessing felony committed by himself, appealeth, or accuseth others to be guilty of the same crime. He is called approver in this sense, because he must *prove* what he hath alledged; and that proof was antiently by battle, or the country, at the election of him appealed or accused, who is called the *appellee*. The form of the accusation is in *Cromp. Just.* 250. Vide also, *Bract. lib.* 3. *Staunf. Pl. Cr.* 52.

A *particeps criminis* cannot be admitted as an approver until he is indicted. If a person indicted for treason or felony, not disabled to accuse, upon his arraignment, before any plea pleaded, and before competent judges, confesseth the indictment and takes an oath to reveal all treasons and felonies that he knoweth of, and therefore prays a coroner to enter his appeal or accusation against those that are partners in the indictment, such a one is an approver. 3 *Inft.* 129. 1 *Hale Pl. Cr.* 192.

This law of approvement being still in force, and the usage of admitting accomplices being analogous to it; does it not appear that an accomplice, after indictment found, and before plea pleaded, may be admitted a witness on the part of the crown? Hale touches on the subject, the party, he says, that is the witness, is never indicted, because that doth much weaken his testimony, but possibly not wholly take away his testimony. 1 *Hale Pl. Cr.* 305.

Sir

innocent of that fact; she was committed to Newgate on warrant of the justices of gaol delivery, to answer such matters as should be objected against her, touching the last felony and forgery. A detainer was afterwards lodged upon her on the oath of sir *Thomas Frankland*.

Under these circumstances, she obtained a *habeas corpus* to the court of king's bench, with a view to be admitted to bail, and the above commitments were returned to the court.

Wallace, Lucas, and Howarth, shewed cause against admitting her to bail, on two points: *First*, that justices of the peace have no power to admit an accomplice in forgery a witness for the crown, forgery not being one of the offences mentioned in the statutes of king *William* the third and queen *Anne*. Vide the statutes. *Ante*

Secondly, that supposing forgery were an offence within those statutes, yet the confession of the defendant had gone no further than one bond, and was silent as to two others, and as she had not complied with the condition which the statute imposes, of making a full disclosure and discovery of all she knew, she was not intitled to any favour or protection in respect of the other two bonds.

Davenport, for the defendant, contended, that as she had been admitted an evidence for the crown by the justices of the peace, and had under the faith and confidence of that admission, made a disclosure of the facts she was acquainted with, it would be a breach of public faith to deprive her of the benefit she was thereby led to expect.

Lord MANSFIELD, in stating the opinion of the court on the above point, said—A third ground which has been urged in support of the present application is this, that the prisoner has been drawn in by promises and assurances to answer to an examination, and to swear to it on oath, which she would not have done, but from a confidence that those promises and assurances would have been kept and performed.

The instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been, that such examination

tion and confessions have not been made use of against them on their trial. But it has been urged, that the prisoner in this case is an *accomplice* who has been admitted to give evidence, and that she has already given evidence, and is further ready to give evidence to convict her partners in this business; and that she is therefore intitled by law, to the king's pardon, and to a pardon which would operate in bar to her own crime. If she had such a right, we should be bound *ex debito justitiæ* to bail her. If she had not such legal right, but yet came under circumstances sufficient to warrant the court in saying, that she had a title of recommendation to the king for a pardon, we should bail her for the purpose of giving her an opportunity of applying for such pardon.

There are *three* ways in law and practice which give accomplices a right to a pardon; and there is *one* mode which intitles them to a recommendation to the king's mercy.

The three legal ways are, *first*, in the case of *approvement*, which still remains part of the common law, though by long discontinuance the practice of admitting persons to be approvers, is now grown into disuse; *secondly*, the case of persons who come within the statutes of king *William* and queen *Anne*; and *thirdly*, the case of persons to whom the king has, by special proclamation in the *Gazette*, or otherwise, promised his pardon. Vide *Blackf. above cited*.

Approvers have a right to a pardon; persons within the statutes of king *William* and queen *Anne* have a right to a pardon, and in all those cases the court will bail them, in order to give them an opportunity of applying for a pardon.

There is beside a *practice* which indeed does not give a legal right; that is where accomplices having made a full and fair confession of the whole truth, one in consequence thereof admitted evidence for the crown, and that evidence is afterwards made use of to convict the other offenders. If in that case they act fairly and openly, and discover the whole truth, though they are not intitled of right to a pardon, yet the *usage*, the lenity, and the practice of the court is, to stop the prosecution

against them, and they have an equitable title to a recommendation to the king's mercy.

The statutes of *William* and *Anne* are to be laid out of the case: *first*, because they are confined to the discovery of particular offences only, of which *forgery* is not one; *secondly*, because they relate only to persons who are not at large; besides which, to intitle themselves to a pardon, they must actually *convict* two offenders at least; for if their confession be such on their trial as to give no credit to, they are liable to prosecution. Promises of pardon from the crown, by proclamation, are also foreign to the present case.

There remains only therefore the equitable practice which gives a title to recommendation to the mercy of the crown.

The law of *approvement* (in analogy, to which this other practice has been adopted) and so modelled as to be received with more latitude, is still in force, and very material.

A person desiring to be an approver, must be one *indicted* of the offence, and in *custody* on that indictment; he must confess himself *guilty* of the offence, and *desire* to accuse his accomplices: he must likewise upon oath discover, not only the particular offence for which he is indicted, but *all treasons* and *felonies* which he knows of; and after all this it is in the discretion of the court, whether they will assign him a coroner, and admit him to be an approver or not; for if on this confession it appears, that he is a *principal*, and tempted the others, the court may refuse and reject him as an approver, 2 *Haw. P. C. ca. Fitzb. Cor.* 50, 251, 441.

When he is admitted as such, it must appear that what he has discovered is true, and that he has discovered the *whole truth*. 10 *Co.* 76.

For this purpose the coroner puts his appeal into form, and when the prisoner returns into court, he must repeat his appeal, without any help from the court, or from any bye-stander. And the law is so nice, that if he *vary* in a *single circumstance*, the whole falls to the ground, and he is condemned to be hanged: if he *fail* in the *colour* of a *horse*, or in circumstances of time, so rigorous

is the law, that he is condemned to be hanged; much more if he fail in essentials. The same consequences follow, if he do not discover the *whole truth*: and in all those cases the approver is convicted on his own confession. 2 *Hale P. C.* 226, to 236. *Staunf. P. C. lib. 2. ca. 52. to ca. 58.* 2 *Hawk, Pl. Cr. ca. 24.* 3 *Inst.* 129.

A further rigorous circumstance is, that it is necessary to the approver's own safety, that the jury should believe him, for if the partners in his crime are not convicted, the approver himself is executed.

Great inconvenience arose out of this practice of approvement. No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders, that accomplices should be received as witnesses, the practice is liable to many objections; and though under this practice they are clearly *competent* witnesses, their single testimony alone is seldom of sufficient weight with a jury to convict the offender, it being so strong a temptation to a man to commit perjury, if by accusing another he can escape himself.

Let us see what has come in the room of this practice of approvement; a *kind of hope*, that accomplices, who behave fairly, and disclose the whole truth, and bring others to justice, should themselves escape punishment and be pardoned. This is in the nature of a commendation of mercy. But no authority is given to a justice of the peace to pardon an offender, and to tell him he shall be a witness against others. The accomplice is not assured of his pardon, but gives his evidence in *vinculis*, in custody: and it depends on the title he has from his behaviour, whether he shall be pardoned or executed. A justice has no authority to select whom he pleases, to pardon or prosecute, and the prosecutor himself has even a less power, or rather pretence to select, than even the justice of peace.

It rests therefore on *usage*, and on the offender's own good behaviour, whether he shall be prosecuted or not. And if in a proper case, an application was to be made to this court, by an accomplice to be bailed, that is of a person properly within the usage, and who has fully complied with the requisite conditions; I should have
no

no difficulty in bailing him, in order that he might apply for the king's pardon.

These he considered the general rules, but the prisoner not having made a full and fair disclosure, which would have intitled her to a recommendation to mercy, she was remanded. *Leach. Cr. Ca. 3 Edit. 133 to 145.*

At the *Old-Bailey, September sessions, 1775*, Mrs. *Rudd* was put on her trial, on an indictment for forgery, before GOULD and ASHURST, J's. and HOTHAM, B. when the same points was made and argued, and the court differing in opinion, she was remanded until the question should be determined by the twelve judges.

In *December sessions* she was again put to the bar, when ASTON, J. informed her, it was the opinion of nine of the judges that she ought to be tried, and she was tried and acquitted. *Vide, the reasons at large. Leach Cr. Ca. 147.*

From the above decision, and the reason on which it is grounded, result the following rules ;

Rule the First.

An *approver*, though he has confessed himself a felon, and of course infamous, and though liable to be hanged for the crime he confesses if he fails to convict the appellee, but certain of a pardon if he succeeds, is notwithstanding a *competent* witness,

Rule the Second.

The *confession* of an *accomplice* in *treason* or *felony*, that he has been guilty of the crime charged upon the prisoner, by acting as an *accomplice* with him, is no objection to his competency as a witness, if he has not been indicted, but goes merely to his credit. 2 *Hawk. P. C. ca. 46.*

As in the case of THOMAS HOWARD, duke of NORFOLK, for *high treason*, before the LORDS, 14 *Eliz.* 1571. His grace objected to one *Barker*, whom he asserted had confessed himself a traitor from fear ; and added, that witnesses must be freemen, not traitors, neither outlawed

lawed nor attainted. But *Barker* was examined, though confessing himself an accomplice, he not having been outlawed, attainted or indicted. 1 *St. Tr.* 113. Vide *Ante* . S. C.

IN CHRISTOPHER LOVE's case for high treason, before the *high court of justice*, under the commonwealth of England. 3 *Car.* 2. Anno 1651.

MR. LOVE, in his defence, objected to the competency of several of the witnesses produced against him. He urged an incompetency as to their *quality*. They were not only persons accused of treason, and so not to be believed, but they had made an open confession of that which was treason, by an act of the (then) government, and so were not *legales testes*. They had done that by open confession which was equivalent to a conviction, and therefore he submitted to the discretion of the court whether they were competent witnesses.

Sir *Thomas Witherington*, second counsel for the commonwealth, answered. The exceptions to the witnesses are, *first*, That they were not *probi testes & legales*. *Secondly*, That they were *participes criminis*; and that is included in the other. The witnesses produced against him are *legales testes*, they are competent and sufficient. Mr. *Love* did object that they confessed themselves guilty of the same crimes, and so their confession is upon the matter a conviction, and being convicted of the crimes in which they are witnesses against him, they are not competent to give evidence.

The common law says, if a man be accused of high treason, indicted of high treason, and will confess the indictment and become an approver, yet he may be a witness against all those parties guilty of the same treasons with himself; he is *participes criminis* with them, and they with him; and yet the man thus becoming an approver, will at common law be a legal good witness against them. *Postea*.

An approver can only approve; that is, when a man is indicted of high treason, and other his accomplices with him, and he upon the indictment says it is true, and then desires he may have something assigned to him, and then he accuses such and such persons of the same crimes;

crimes; in this case this man, after he hath confessed the indictment, and takes his corporal oath to reveal all treasons he knows in the indictment (for he can accuse no further) after this is done he shall be a witness: he is a witness against those with whom he is *particeps criminis*; and it is of merit and justice that he shall be *pardoned* his life. That shews the reason, that even a man after indictment and confession, yet being an *approver*, shall be an *accuser* of those that were *particeps criminis* with him, and a good witness. The reason of that goes to this case, for although these men had a hand in the same plot and design with him (Mr. Love) and have confessed, and did confess it upon evidence, that they were there present and did many things, yet they are clear, competent, and good witnesses, and it is no objection against them that they are *participes criminis*. Vide, *Hale P. C.* 303. Mrs. *Rudd's* case, lord MANSFIELD's argument. *Ante*

If the law were otherwise, it were impossible to prove many offences; for many offences cannot be proved but by some men that had a hand in them. In an ordinary case of an action of trespass and false imprisonment, if three men are guilty of it, it is a usual thing in courts of justice to admit one of them as a witness. True, they are not parties in the action, and so may be witnesses: for these things may be so secretly done otherwise, that their treasons could never be revealed to recover against the prisoner.

The earl of *Castlehaven* was accused of a very grievous fact; the witnesses that came against him were his own *menial* servants, and were *participes criminis* in the very same fact; and these men by the opinion of the judges, were competent witnesses. He was arraigned, indicted, and convicted, and suffered death; and one of these persons was afterwards hanged for the same offence, which shews they were clear and good witnesses.

It is said they were not *probi testes*. They are *probi testes*, *et honesti* too: for in case of an approver, that man that accuses his brethren upon the same treason, of merit and justice the king ought to grant him his pardon; for they that discover the traitors against the commonwealth,
are

are certainly *probi testes*, and this is no objection against them in that, but as before they were *legales testes*, so they are *probi testes*; and good and competent in this case.

Mr. *Hale* (afterward sir *Matthew Hale*) being assigned of counsel for the prisoner, observed on this point, the case that is put concerning an approver comes not to the question; for though it is true an approver at common law might be an accuser, yet we are not now upon a proceeding of the common law, when we talk of witnesses now, but we are upon a proceeding how far forth warranted for the witnesses, by the statute of the 1 and 5 of *Edw. 6*. So that what is said concerning an approver comes not to this question; he that may be a competent witness at common law, he is not a competent witness upon those statutes, for the words of the statute are expressly, "*That he shall be a lawful and sufficient witness.*" And if so be, that such a case were now, it is not to sample this case that is before you with the case of an approver, which is a bare accusation at common law, and where the jury likewise are to have other evidence; for either the defendant may wage his battle or put himself upon his country; and then it is at the pleasure of the jury whether they will believe the approver or no: but the act hath made an alteration in the common law, in corroboration of this opinion. 1 *Hale P. C.* 363. & 2 *Hale P. C.* 280.

The objection was over-ruled. 1 *St. Tr.* 113. 2 *St. Tr.* 144, 339, 1099. 3 *St. Tr.* 883. 4 *St. Tr.* 149, 572, 594. 6 *St. Tr.* 259.

NOTE. This case, which was before a court established by usurpation, is cited, not as deriving authority from its jurisdiction, but in respect to the argument in which *Hale* took a part.

So on the trial of the REGICIDES, *Old-Bailey*, October, 12 Car. 2. 1660, the evidence of accomplices, in the treason and murder of king CHARLES I. was received, 2 *St. Tr.* 302. 1 *Hale Pl. Cr.* 304.

In the KING, *v.* TONGE, PHILIPS, and STUBBS, *Newgate sessions*, December, 14 Car. 2. It was resolved that some of those persons who are equally culpable with the

rest, may be made use of as witnesses against their fellows, and they are lawful accusers, or lawful witnesses within the *stat. 1 Edw. 6. ca. 12. § 6* & *6 Edw. 6. ca. 11. § 1 Mary, ca. 1.* and accordingly at the trial of these men, some other partners in the treason were made use of against the rest; for lawful witnesses within those statutes, are such as the law alloweth; and the law alloweth every one to be a witness who is not convicted, or made infamous for some crime. And if it was not so, all treasons would be safe, and it would be impossible for one who conspires with never so many others, to make a discovery to any purpose. *Kelyng* 18.

But HALE, C. B. said, that if one of these culpable persons be promised his pardon, on condition to give evidence against the rest, that disableth him to be a witness against the others, because he is bribed, by saving his life, to be a witness, so that he takes a difference where the promise of pardon is to him for *disclosing the treason*, and where it is for *giving evidence*. *Ibid.*

But some of the other judges did not think that the promise of pardon, if he gave evidence, did disable him, but they all advised that no such *promise* should be made, or any *threatening* used to them in case they did not give full evidence. *Ibid.*

The judges who dissented were, lord HALE and BROWN, J. and Hale continued of the same opinion, when he wrote his *Pleas of the Crown*, in which he says, "If a reward be promised to a person for giving his evidence before he gives it, this, if proved, disables his testimony. And, for my own part, I have always thought, that if a person hath a promise of a pardon, if he gives evidence against one of his own confederates, this disables his testimony if it be proved upon him." 2 *Hales P. C.* 288.

HAWKINS supports the resolution of the judges reported by *Kelyng*, and says with them, if no accomplices were to be admitted, it would generally be impossible to find evidence to convict the greatest offenders. 2 *Hawk. P. C. ca. 46.* And,

HALE, in another part of his work, after stating the resolutions in the case of *Tonge*, and others, says, "But
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"the jury may, as in other cases, consider of the evidence and *credit* of the witness; but he is sufficient to satisfy by the statute;" which shews that, except where a pardon is previously promised, the objection goes, not to the *competency* but to the *credit* of the *participes criminis*. 1 Hale P. C. 303.

He then says, a *participes criminis* is in some cases a lawful accuser within the statute, in some cases not.

In sir PERCY CROSBY's case, in the *Star-chamber*, it was ruled, that if two defendants be charged for a crime, one shall not be examined against the other to convict him of an offence, unless the party examined confess himself guilty, and then he shall be examined.

And in the KING, v. MARY PRICE, *Newgate sessions*, 1672, the defendant was convicted of treason, in clipping the current money of England, by the testimony of those who were *participes criminis*, who brought her in broad money upon allowance of ten *per cent.* and carried off the clipped money into their master's cash. But it does not appear in this case, whether the accomplices were promised a pardon or not. 1 Hale Pl. Cr. 304.

So in the KING, v. HYDE, and others, in the same year, for robbery on the highway, the prisoners were convicted by one that was a party in the robbery, but not indicted. 1 Hale P. C. 305.

And in the KING, v. TREW, *Newgate sessions*, December, 15 Car. 2. Defendant was indicted for burglary, and by advice of Kelyng, C. J. Browne, J. and Wild, Recorder, Perrin, that was in gaol for two other robberies, and confessed himself to be in this burglary, was sworn a witness against Trew, but he was not indicted of the burglaries or robberies. *Ex libro Bridgman*. 1 Hale P. C. 303.

From the preceding determinations and which follow, it appears to be settled law at this day, that,

Rule the Third,

As on an indictment for felony, a prisoner, by the rules of the common law, may be found guilty on the uncorroborated evidence of a single witness; so, if the

jury believe the testimony of an *accomplice*, though such testimony stands totally uncorroborated, a prisoner may be found guilty of a capital crime.

As in the *KING, v. JAMES ATWOOD, and THOMAS ROBBINS*, Summer assizes, at Bridgewater, county of Somerset, 1788.

The prisoner was indicted for a robbery on the highway—

The prosecutor deposed, that on the day laid in the indictment, he was met by three men, who after using him with violence and threatening his life, demanded his money; and that in consequence of their threats, he delivered to them the property mentioned in the indictment; but that it was so dark at the time, he could not swear that the prisoners at the bar were two of the men who robbed him.

An accomplice was under this circumstance admitted to give his testimony; and he deposed, that he and the two prisoners at the bar, had in company with each other, committed the robbery.

The jury, upon the evidence of these two witnesses, found the prisoners *guilty*, but the judgment was respited, and the case submitted to the consideration of the twelve JUDGES.

BULLER, J. who had tried the prisoners, addressed them at the ensuing assizes, as follows: Prisoners, you were convicted of a highway robbery at the last summer assizes, at Bridgewater: the material circumstances of the trial were these: the prosecutor gave in evidence that he was robbed by three men, on the day laid in the indictment, mentioning the conversation that passed during the robbery, and proving all the facts that are necessary in the law to constitute that offence; but as it was dark he could not swear to the person by whom it was committed.

The accomplice was then called who swore, that he and you had, in the company of each other committed this robbery; and he mentioned all the circumstances that passed, which exactly corresponded with those the prosecutor had before related.

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On the testimony of these two witnesses the jury found you guilty, but on a doubt arising in my mind, respecting the propriety of this conviction, I thought it proper to refer your case to the consideration of the twelve judges.

My doubt was, whether the evidence of an accomplice, unconfirmed by any other evidence, that could immediately affect the case, was sufficient to warrant a conviction?

And the TWELVE JUDGES were unanimous in opinion, that an accomplice *alone* is a competent witness. And that if the jury weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony *alone*, is perfectly legal.

The distinction between the *competency* and the *credit* of a witness hath been long known. If a question be made respecting his *competency*, the decision of that question is the exclusive province of the judge, but if the ground of his objection go to his *credit* only, his testimony must be received and left with the jury, under such directions and observations from the court, as the circumstances of the case may require, to say whether it be sufficiently *credible* to guide their decision on the case.

An accomplice therefore being a *competent* witness, and the jury in the present case having thought him worthy of *credit*, the verdict *guilty* which has been found, is strictly legal, though found on the testimony of the accomplice only. *Leach's Cr. Ca. 2 Edit. 365. 3 Edit. 521.*

So in the KING, v. DURHAM and CROWDER, *Old-Bailey, December sessions, 1787*, on an indictment for burglary, in the dwelling house of *Hannah More*, and stealing therein a great quantity of wearing apparel.

The only evidence which affected the prisoners, arose from the testimony of *Francis Flemming*, a pawn-broker, who had been in the habit of receiving stolen goods for a series of years, but who had impeached a great number of the principal offenders, and had been bound over by the justices of the peace to give evidence against them, as a witness for the crown.

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The prisoners' counsel, by an examination of *Flemming* on the *voire dire*, endeavoured to prove him an accomplice in the burglary, in order to form an objection against the competency of his evidence, on the ground that no previous testimony of the prisoners' guilt had been given, and that under such circumstances the uncorroborated testimony of an accomplice could not be received.

The COURT said, that *Flemming* was to be considered rather as an accessory after the fact, than as an accomplice in the fact: but even admitting that he had been an accomplice, the objection would only go to his *credit*, and not to his *competency*; and *Atwood's* case was cited as in point and conclusive, that the circumstance of a witness being an accomplice went to his *credit* only, and that his evidence might be left to the jury, although it was entirely uncorroborated by any other testimony; and that the practice of rejecting an unsupported accomplice, is rather matter of discretion with the court, than a rule of law. The jury found the prisoners *guilty*.

NOTE. There was evidence in this case by another witness, that a felony was committed; the matter was mentioned to the judges, and the prisoners received sentence of death. *Leach Cr. Ca. 3 Edit. 539.*

And in *JORDAIN, v. LASHBROKE, Easter, 38 Geo. 3.* GROSE, J. relies upon the case of the *King, v. Atwood, and Robbins*. His words are; a man shall not sustain an action upon a ground which proves him guilty of a breach of the law. So a man shall not recover money due upon an illegal consideration, such as usury, gaming, smuggling, or the like. But this rule does not extend to shut the mouths of witnesses guilty of criminal actions; if it did, witnesses daily received in courts of justice and whom the policy of the law invites to come forward, must be rejected; such as *accomplices* and others, concerned in illegal transactions; leaving their *credit* to the wisdom and discretion of a jury.

He then cited *Atwood's* case, which he said was not founded on a new principle, for in *Hale* there are different instances of convictions, on the evidence of accomplices, one in 1672, of a conviction of *Hyde* for a robbery

bery on the highway, on the testimony of one who was a party in the robbery, but not indicted. The cases cited for the defendant shew clearly what the policy of the law is, and that a man's guilt in the transaction disclosed, if he be not rendered *infamous* by *conviction*, and on that account incompetent, is not an objection to his testimony. 1 *Hale's P. C.* 303, 304, 305. 7 *Term. Rep. B. R.* 609, 610. Vide *Post*. *Atwood's case*.

Rule the Fourth.

This rule is only applicable to Ireland. As the evidence of one witness is sufficient to convict at common law, and *approvers* and *accomplices* being competent witnesses in Ireland, a defendant to an indictment for high treason, may be convicted on the uncorroborated testimony of an approver or accomplice, charging himself with treason, felony, or any other infamous crime or crimes, of which he has not been previously convicted. Vide *ca. 5. on the number of witnesses required in high treason. Ante*.

Rule the Fifth.

Accomplices who are *indicted* are good witnesses for the king until they be convicted. 2 *Hawk. Pl. Cr. ca.* 46.

This appears in the case of TONGE, before cited, where it was resolved by the judges, that the law alloweth every one to be a witness, who is not convicted or made infamous for some crime. *Kelyng.* 17. 3 *Keb.* 136. *Ante*.

So *approvement*, which is a species of confession, does not destroy the competency of the approver, though he stands as if indicted, and if he fail in proving the appellee guilty, he shall be hanged. 1 *Hale P. Cr.* 303. *Stamf. Pl. lib. 2. ca.* 56. 145. a. 4 *Black. Comm.* 129. *Ante*.

Rule the Sixth.

A promise of *pardon* to an accomplice doth not affect his competency, on the trial of the party accused by him.

An *approver* is insured his pardon, if he makes good his accusation against the appellee, so by analogy it appears, that a promise of pardon to an accomplice does not affect his *competency*, but goes metely to lessen his *credit* with the jury.

As in the case of the KING, *v.* TONGE, above cited.

And in the case of the KING, *v.* CHRISTOPHER LAYER, *Mich. 9 Geo. 1: Banco Regis.*

Stephen Lynch, an accomplice, being produced; the prisoner demanded that he should be examined on the *voire dire*, whether he had not a promise of pardon, or some other reward for swearing against him. But this demand, after long debate, was over-ruled, as being a question, which if answered in the affirmative, would not take off his testimony by tendering him *incompetent*. The question proposed arose (as EYRE, J. observed) from the *influence* which the *hopes of pardon* might possibly have upon the witness, and if this was a reason for setting aside a witness as *incompetent*, no accomplice who discovered a conspiracy, could ever be allowed to prove it upon oath, for no man ever made discovery but with hopes of pardon. Such persons have always been allowed to be witnesses. In the *King, v. Gordon*, the prisoner's counsel would have asked the same question, but the court did not think it proper before the witness was sworn, because the question did not affect his *competency* but his *credit*. And Mr. Justice ALAND, said, the reason the court gave in *Gordon's* case for refusing this question on the *voire dire*, was, that if he had this promise, such promise was made either to speak the truth, or to speak a falsehood; if it was to give a just and true evidence, there was no harm in it; and if it was a promise of pardon for speaking that which was not true, the witness was not bound to answer that question, and consequently it can be of no use whatsoever. Therefore
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the witness must be sworn: *Laver Tr. folio edit. 476. St. Tr. 257.*

Sir *Matthew Hale* holds a contrary opinion, he says, "For my own part, I have always thought, that if a person have a promise of pardon, if he gives evidence against one of his own confederates, this disables his testimony, if it be proved against him." 2 *Hales Pl. Cr. 280.*

Rule the Seventh.

An accomplice may give evidence before a grand-jury to support an indictment against a *particeps criminis*; and the bill found is good, although the accomplice was not previously admitted an evidence for the crown.

As in the KING, against WILLIAM DODD, doctor of laws, *Old-Bailey, February sessions, 1777.* Indictment for forgery, on *stat. 22 Geo. 2. c. 25.* before GOULD and WILLES, J's. and HOTHAM, B.

The names *William Dodd* and *Lewis Robertson*, both to the bond, and to a receipt as attesting witnesses of the signature, *Chesterfield.* They were charged with being equally guilty of the forgery; and from the evidence given against them before the magistrate, he committed them as principal felons to Newgate.

The indictment was preferred against *William Dodd* only. The agent for the prosecution obtained an order from the clerk of the arraigns, directed to the keeper of Newgate, commanding him to carry *Lewis Robertson* before the grand-jury, for the purpose of giving evidence to support the indictment against *William Dodd*; and he was examined before the grand jury accordingly.

The indictment was found and the name of *William Robertson*, among others, indorsed on it, as a witness for the crown. The justices of gaol delivery being informed of these transactions, made an order, declaring the first order illegal and void, as having been surreptitiously obtained.

Doctor *Dodd*, on his being called to arraignment on this indictment, submitted to the court, that as *Lewis Robertson* was in custody under a legal warrant of commitment,

mitment, as a principal in the offence with which *he* was charged, and without having been admitted a witness for the crown by any legal authority, had been carried before, and examined before the grand jury, by virtue of a surreptitious and illegal order, the indictment against *him* (the prisoner on trial) had been found upon improper evidence, and therefore he ought not to be compelled to plead to it.

After argument by *Howarth*, *Cowper*, and *Buller*, for the prisoner, and *Mansfield* and *Davenport* for the crown, it was agreed that the trial should proceed; and on the jury finding the prisoner *guilty*, the sentence was respited, and the question submitted to the consideration of the *twelve judges*.

ASTON, J. delivered the result of their conference to this effect. The JUDGES have fully considered the whole matter of this objection, and they are unanimously of opinion, that the necessity of some proper authority, to carry a witness who happens to be in custody, before the grand jury to give evidence, regardeth the justification of the gaoler only; but that no objection lies on that account in the mouth of the party indicted: for in respect to him, the finding is right, and according to law.

Whether a private prosecutor by using an *accomplice*, in or out of custody as a witness, gives such a witness a plea not to be prosecuted, or can intitle the prosecutor himself to have his recognizance discharged, is a matter very fit for consideration whenever that question shall arise: but it is a matter in which the party indicted hath no concern; nor can he make any legal objection to the producing such a person as a witness; for the accomplice is against him a *legal* and a *competent* witness; and so was *Lewis Robertson*, upon the bill of indictment found upon this occasion.

The judges therefore are of opinion, that the proceedings upon that indictment were legal, and that the prisoner was convicted according to law. He was executed. *Leach's Cr. Cases*, 2 Edit. 141. 3 Edit. 184.

Rule the Eighth.

The admitting an accomplice as a witness for the crown is not a matter granted of course by the court, but depends upon the question, whether the indictment can be found and supported without his evidence.

As in the KING, v. ROBERT and WILLIAM LUCKHURST, *Maidstone, Lent assizes, 1798.*

Counsel for the crown, moved, that *Avery*, an accomplice, might be brought before the grand jury to give evidence on a bill of indictment.

BULLER, J. said, it was not a motion of course, and he therefore requested the counsel to read over his brief, and certify that there was not sufficient evidence to convict, without the testimony of the *accomplice*, otherwise he would not allow the motion; because it might be the means of letting off the worst offender, and punishing those to whom otherwise, according to circumstances, mercy might be shewn; and he instanced a similar case that happened at York assizes.

The *counsel* then stated, that this *accomplice* had been before admitted king's evidence against the others by the committing justice.

BULLER said, that he would not pay any regard to that, because it ought not to be in the power of a justice of the peace to say, who ought and who ought not to be admitted king's evidence.

The *counsel* thereupon said, that he thought, on reading the indictment and his brief, the *accomplice* ought to be admitted such evidence, and his motion was granted. *Crown Cir. Comp. by Dougherty. 7 Edit. 138, 139. Vide Rudd's ca. Antq. , Doctor Dodd's ca. Antq.*

Rule the Ninth.

But it hath been an almost invariable rule of clemency, with the judges, that unless some fair and unpolluted evidence, corroborate and give verisimilitude to the testimony of an accomplice, to recommend to the mercy of

the crown, a prisoner convicted under such circumstances.

And this principle of mercy, and the rule that the objection to the evidence of a *particeps criminis* affects his *credit* only, but does not bar his *competency*, was long since promulged by that most excellent judge sir *Matthew Hale*, who saith, that though a *particeps criminis* be admissible as a witness in law, yet the *credibility* of his testimony is to be left to the jury; and truly it would be hard to take away the life of any person upon such a witness, that swears to save his own, unless there be also very considerable circumstances which may give the greater credit to what he swears. 1 *Hale Pl. Cr.* 305.

And on the high trials for high treason, previous and subsequent to the breaking out of the rebellion in Ireland, the judges constantly reminded the juries of the questionable shape in which approvers appeared, and the discredit which their own confessions attached to their evidence.

Rule the Tenth.

In misdemeanors parties indicted separately from the party on trial, or not indicted, though concerned in the transaction, are *competent* witnesses; and the same rule holds good in many species of civil action, where the witness is not made a defendant.

As if A. and B. be indicted for assaulting the same person, and tried separately, they are good witnesses for each other.

So where A. B. and C. are sued in three several actions on the statute, for a supposed perjury, in their evidence concerning the same thing, they may be good witnesses in such action for one another. 2 *Hawk. Pl. Cr. ca.* 46.

So in *CLARKE, v. SHEE and JOHNSON*, in *assumpsit*, on the common counts, to recover back money the property of the plaintiff, lost by *David Wood*, clerk to the plaintiff, at insuring in the lottery, contrary to the statute. It appeared in evidence, that the money in question was the identical money lost at insuring, and which
Wood

Wood had received to his master's use: but it was objected, that *Wood* being a *particeps criminis*, should not have been admitted as a witness on the trial, for that no man should be allowed to prove his own turpitude, as perjury or the like: whereas this man was called to prove himself guilty of a breach of trust, in embezzling his master's money, and also a breach of the act of parliament. The court held on this objection, there could be no doubt but *Wood* was an admissible witness.

And in *BUSH, v. RALLING, Trinity, 29 & 30 Geo. 2. Banco Regis*, the principles before laid down were recognized as law. Motion for a new trial. The action was debt, on *stat. 2 Geo. 2. ca. 24.* by which it is enacted, "That if any person, by himself, or any person employed by him, shall by any gift or reward, or by any promise, agreement, or security, for any gift or reward, corrupt or procure any person to forbear to give his vote, in any election for a member of parliament, such person shall forfeit the sum of five hundred pounds."

The declaration alledged, that *Ralph Thrale, esq.*, while candidate for the borough of *Abingdon*, did corrupt *John Hervey*, to forbear to give his vote, by giving him twenty guineas.

FOSTER, J. ruled, that *Hervey* was a competent witness.

The COURT concurred in the rule. There are two objections, namely, that *Hervey* was a *particeps criminis*, and that the tendency of his evidence was to discharge himself from penalties and disabilities. It would perhaps be a full answer to these objections to say, that a *particeps criminis*, although the tendency of his evidence be to obtain a pardon, or even a reward for himself, is, in divers cases a competent witness: but by the statute, there is a legislative declaration, that one person offending against this act may be witness against another offending against it.

In *PHILIPS, v. FOWLER*, it was ruled at *Nisi Prius*, by *ETRE*, Chief Justice of the Common Pleas, that *Hoare*, to whom money had been given to forbear to vote for a candidate, was a competent witness against the

the giver of the money, in an action under this statute, and the chief justice said, unless the evidence of the taker of the money, notwithstanding he is a *participes criminis* be in such case admitted, the statute will be of very little avail. *Sayer* 289, 290. And Vide *Jardain, v. Lashbrook*. 7 Rep. 699, 610, *Ante* ,

CHAPTER XVIII.

On the competency of persons convicted or attainted.

BY the older authors it appears, that a conviction, and therefore *a fortiori* an attainder or judgment of treason, felony, premunire, perjury, forgery, on the statute of 5 Eliz. and also a judgment in attaint, in giving a false verdict; or in conspiracy at the suit of the king; and also judgment for any crime whatsoever to stand in the pillory, to be whipt, or branded, being in a court which had a jurisdiction, are good causes of exception against a witness, while they continue in force. 2 Hawk. Pl. Cr. ca. 46. 1 Hale Pl. Cr. 306. *Crompt. de hoc Regis*. Dalt. ca. 111. New Edit. ca. 164. p. 564.

And COKE says, that if a man by judgment hath lost his ears, or stood upon the pillory, or tumbrel, or being stigmatized or the like, whereby he becomes infamous for some offence, he shall not be sworn as a witness, Co. Litt. 6. b. 3 Inst. 219. 2 Hale Pl. Cr. 277, 278,

Rule the First.

But according to modern authorities, it is the *infamy* of the crime, and not the *punishment*, which disqualifies from being a witness; and therefore persons stigmatized by an infamous punishment, such as being set in the pillory, are admissible witnesses; unless the punishment was inflicted for *forgery*, *perjury*, or other species of the *crimen falsi*, or other crime of an *infamous* nature. 2 Hawk. Pl. Cr. ca. 46.

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Lord Chief Baron GILBERT assigns the reason that persons so stigmatized, should be excluded from giving testimony. It is because every plain and honest man affirming the truth of any matter under the sanction of an oath, is intitled to faith and credit; so that under such attestation the fact is understood to be fully proved. But where a man is convicted of falsity and other crimes, against the common principles of honesty and humanity, his oath is of no weight, because he hath not the credit of a witness, and there is a greater *presumption* against him, than can be on his behalf.

For the presumption is benign and humane to every man produced as a witness, that he will not falsify or prevaricate, in matters of such importance as all affairs of justice are; but where a man is a notorious and public criminal this presumption fails him; and from thenceforth he is rather to be intended as a man profligate and abandoned, than one under the sentiments and conviction of those principles that teach probity and veracity; and consequently, the producing such a man is ineffectual, because the credit of his oath is overbalanced by the stain of his iniquity. *Gilb. Evid. by Lost. 256. 2 Bulst. 154. Brac. b. 4. ca. 19. sect. 2. Flet. b. 4. ca. 8. sect. 2. Bro. ca. 15.*

The common punishment that indicates the *crimen falsi* is being set in the pillory; and, therefore, they anciently held the law to be, that no man legally set in the pillory could be a witness, for they thought it a ridiculous thing and boding ill to a cause, when a person thus stigmatized appeared in court to attest any thing; but the rigour of this is reduced to reason: for now it is held, that unless a man be put in the pillory for *crimen falsi*, as for perjury, forgery, or the like, it is no blemish to a man's attestation; for a man may be pillored for speaking scandalous words of the government, which yet, in doubtful and factious times, ought not to be taken as a presumption against his common credibility. *Ex delicto, non ex supplicio, emergit infamia. Ibid. 257.*

In *PENDOCK, on the devise of MACKENDER, v. MACKENDER, Hilary, 28 Geo. 2. 1755. Common Pleas.* The point appears to have been settled. Ejectment for lands
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in Kent. A case was reserved from the assizes, by which it appeared, that J. M. being seized of the lands in question, by his will, executed in 1750, devised the lands to the defendant. That there were three witnesses to the will; that *Joseph Jefferies*, one of the witnesses, before the time of attestation thereof, was indicted, tried, and convicted of stealing a sheep, and was found guilty to the value of ten pence, and had judgment of whipping.

The plaintiff claimed as heir at law to the testator, and therefore the single question was—Whether one convicted and whipped for petit larceny be a competent witness, within the statute of frauds and perjuries.

The COURT, after three arguments at the bar, were clearly of opinion, that *Joseph Jefferies* was not a competent witness, and laid it down as a rule, that it is the crime that creates the infamy and takes away a man's competency, and not the punishment of it: and it is absurd and ridiculous to say, it is the punishment that creates the infamy.

The pillory has always been looked upon as infamous, and to take away a man's competency as a witness; but this notion is very absurd, for suppose a man convicted on the statute 4 *Will. & Mary*, against deer-stealing, there is a penalty of thirty pounds to be levied by distress, and if he has no distress he is to be put in the pillory, so that if the pillory be infamous, the person convicted (according to this notion) will be infamous, if he has not thirty pounds; but, if he has thirty pounds he will not be infamous.

In the present case, both the crime and the punishment are infamous; and he that steals a penny, has as wicked a mind as he that steals a larger sum, if not a more wicked mind, for he has the less temptation. Petit larceny is felony; and no case has been cited, where a person convicted thereof was ever admitted to be a witness. Judgment for the plaintiff *per totam curiam*. 3 *Wils.* 18, 19.

But it has been since enacted, "That a conviction of "*petit larceny* shall not incapacitate the party convicted
" from

"from being a competent witness." *Englsh*, 31 *Geo.* 3. ca. 35. *Irijb*, 36 *Geo.* 3. ca. 29.

With the decision above cited from *Wilson's* reports, the civil and common law agrees, for by those laws no such *judgment* disables a witness from giving testimony, unless the nature of the crime be infamous. 3 *Lev.* 426, 427.

Rule the Second.

But where the conviction and judgment is for an offence recognized by law as infamous in its nature, though not attended by what is termed infamous punishment, yet the delinquent is rendered incompetent to give evidence in a court of justice.

In the *KING, v. FORD*, *Micb.* 12 *Will.* 3. *Banco Regis*. It was objected that a witness produced was convicted of *barratry*, and the record was produced. The judgment was, to be fined five hundred marks, but not to stand in the pillory.

On the other side it was argued, that a bare conviction of perjury would take away evidence, because it is an infamous crime; but not so of *barratry*, which was not of an infamous nature, without an infamous punishment, as the pillory.

HOLT, C. J. He is disabled by the conviction, for it is the nature of the crime and conviction that creates the infamy. 2 *Salk.* 690. And Vide the last cited case. 1 *Wils.* 18.

So in the *KING, v. GEORGE CROSSLEY*, *Trinity*, 27 *Geo.* 3. 1787, *B. R. Nisi Prius*, at Westminster.

William Priddle, *Thomas Holloway*, and *Stephen Stephens*, were indicted at the *Old-Bailey*, *April sessions*, 1787, of conspiracy to indict *George Crossley*, an attorney, for perjury, for which he had been tried at the *Old-Bailey*, and was acquitted. They were sentenced to pay a fine of six shillings and eight pence each, and to be imprisoned in his Majesty's gaol of Newgate: *Priddle* for the term of two years; and *Robert Holloway*, and *Stephen Stephens*, for the term of eighteen months.

While in prison under this sentence, *George Crossley*, the prosecutor for the crown, on the indictment for the conspiracy, was himself indicted at Hicks's-hall for wilful and corrupt perjury, and the indictment being removed into the court of King's bench, came on to be tried at *Nisi Prius*, at *Westminster*, *Trinity*, 1787, before BULLER, J.

William Priddle was produced at the trial as a witness on the part of the crown. He was examined on the *voir dire* by the traverser's counsel, and acknowledged that he had been convicted of the conspiracy above stated, and was that morning brought up by *habeas corpus* from the gaol of Newgate, where he was imprisoned for that offence.

The traverser's counsel objected to his being examined: submitting to the court that a conviction on an indictment for conspiracy, rendered the party convicted *infamous*, and of course destroyed his competency as a witness.

BULLER, J. Acceded to the legality of the objection; observing, that *conspiracy* was a crime of a blacker die than *barratry*, and the testimony of a person convicted of *barratry* had been rejected. 2 *Salk.* 690. *Ante*.

He said, that it is now settled law, that it is the infamy of the crime which destroys the competency of a person convicted, and not the nature or mode of punishment; and therefore a conviction of any offence, which is comprehended under the denomination of *crimen falsi*, destroys the competency of the person convicted: and among other cases, he mentioned perjury and forgery, by the common law. The testimony of *Priddle* was of course rejected, and *Crossley* was acquitted. *M. S. Leach's Cr. Ca.* 349, 350.

NOTE. The same *George Crossley* was some years afterwards convicted of perjury, and received sentence to be transported. *Term. Rep.*

NOTE. On a conviction for a conspiracy, *Hawkins* confines the incapacity of a witness to a conviction, particularly at the suit of the king; but other writers say generally, that one attaind of conspiracy cannot be a witness,

witness, as in the above case. 1 *Hals Pl. Cr.* 306.
Crompt. de Pace Regis. 172. *Dalt. ea.* 111. p. 542.

Rule the Third.

The conviction of a defendant on a charge of an infamous nature, does not complete incompetency: to consummate that incapacity, judgment must follow; but execution thereof is not necessary.

So in the *KING, v. CROSBY, East. 7 Will. 3. B. R.* The court held, that where the sentence of the pillory is passed, if the crime be of an infamous nature, it is not necessary that the defendant should have suffered the sentence to render him an incompetent witness; for it is the judgment which creates the infamy and not the execution of the punishment. 2 *Salk.* 688. 2 *Inst.* 219.

And in *LEE, v. GANSELL, Hilary, 14 Geo. 3.* An affidavit of *Lee*, the plaintiff, was offered to be read. Objected, that he stood convicted of perjury, and the conviction was produced.

Lord MANSFIELD, C. J. A conviction upon a charge of perjury is not sufficient, unless followed by a judgment; I know of no case where a conviction alone has been an objection, because upon a motion in arrest of judgment, the conviction may be quashed. 3 *Cowp.* 3. *M. S.*

Rule the Fourth.

Judgment for an infamous crime, which renders a man incompetent as a witness, doth not disable him from making an affidavit in defence of a charge brought against him.

This has been repeatedly ruled, on motions for informations and attachments, &c. in the King's bench.

As in *DAVIS, v. CARTER, Hil. 8 Will. 3.* and *Mich. 4 Anne, Banc. Reg.* A motion was made, to set aside a judgment for irregularity, on the defendant's affidavit. *Whitacre* objected to the reading of it, because he was convicted of perjury.

HOLT, C. J. Must he therefore suffer all injuries and have no way to help himself? Had you the record of conviction in your hand it would make no difference. The affidavit was read. 2 *Salk.* 461.

Rule the Fifth.

But though a man against whom there is judgment for an infamous crime, is admitted to answer a charge against himself by affidavit; yet he is not allowed to support a complaint, or to do other acts of a judicial nature upon his own oath.

As in the *KING, v. DAVIS*, and *CARTER, Hil. 7 Will. 3. Banc. Reg.* *Davis* and *Carter* had stood in the pillory, and the court would not allow their affidavits to be read. *Vide Ante . S. C. 1 Salk.* 461.

So in *NICHOLSON, v. DALLYHUNT*. Affidavit to hold to bail, made by the plaintiff's wife, who being convicted of pocket-picking was transported; and afterwards being convicted of returning from transportation, received judgment of death. These matters appearing upon record—The COURT held she could not be a witness in any case.

And in *WALKER, v. KEARNEY*, 14 *Geo. 2. Ban. Reg.* A rule for an attachment *nisi* being granted on the affidavit of the defendant, the party complained of, shewed for cause, that the defendant had been convicted of forgery and stood in the pillory, and produced the record and an affidavit of the identity of the person.

The COURT discharged the rule, because the affidavit of a person who has received judgment of an infamous crime cannot be read to support a complaint—but may to defend a charge against him. 2 *Stra.* 1148.

Rule the Sixth.

Whenever the competency of a witness is objected to on the charge of conviction and judgment on an infamous crime, the party making the charge must produce in court the record of the judgment. 2 *Hawk. Pl. Cr. ca. 46.* 4 *St. Tri.* 175.

And

And this rule results from the great general and pervading principle, that the best evidence the case admits of must always be produced.

CHAPTER XIX.

Of the legal Acts which restore Competency to Persons convicted of infamous Crimes.

Rule the First.

A PERSON convicted of felony, who is admitted to his clergy, and *burned in the hand*, is thereby enabled to be a witness; for the burning in the hand operates as a statute pardon. 2 *Hawk. Pl. Cr. ca.* 46.

Or, as some legal writers explain this rule, the burning in the hand is in the nature of a statute pardon: being a condition or performance, of which the discharge from punishment, and the restitution of credit takes place. 4 *Blackf. Comm.* 367. *Post*.

Perfectly to understand the cases which illustrate the preceding rule, it is necessary to define the privilege termed BENEFIT OF CLERGY.

CLERGY, the *privilegium clericale*, in common speech *benefit of clergy*, had its origin from the pious regard paid by christian princes to the church in its infant state, and the ill use which the ecclesiastics made of that regard. The particular privilege now treated of, was the exemption of the *persons* of clergymen from criminal process before the secular judge, in a few certain cases.

This privilege, in process of time, they claimed as their inherent right, as a right indefeasible and *jura divino*; and by their canons and constitutions extended this exemption, as well in regard to the crimes themselves, of which the list became universal, as in regard to the persons exempted, among whom were at length comprehended, not only every officer belonging to the church or clergy, but many that were totally laymen. *Kielw.* 180. 2 *Hale P. C.* 377.

In

In England, a total exemption of the clergy from secular jurisdiction could never be thoroughly effected; therefore, though the ancient *privilegium clericale* was in some capital cases, yet it was not universally allowed. In those particular cases the use was for the bishop or ordinary to demand his clerks to be remitted out of the king's courts as soon as they were indicted, concerning the allowance of which demand there was great uncertainty, until the reign of *Henry 6.* when it was settled, that the prisoner should first be arraigned, and might either *then* claim his benefit of clergy, by way of *dilatory* plea, or *after conviction*, by way of arresting judgment.

Originally no man was admitted to the benefit of clergy but such as had the *habitus tonsuræ clericalem*; but, in process of time, every one who could read, being accounted *clericus*, was allowed the benefit of clerkship; but it being found, that as many laymen as divines were admitted to the *privilegium clericale*, and therefore by *stat. 4 Hen. 7. c. 13.* a distinction was once more drawn between mere lay scholars, and clerks that were really in orders; which statute directs, that no person once admitted to the benefit of clergy, shall be admitted thereto a second time, unless he produces his orders, and all laymen, who are allowed this privilege, shall be burnt with a hot iron in the brawn of the left hand. This distinction between learned laymen and real clerks in orders, was abolished for a time by the statutes 28 *Hen. 8. ca. 1.* and 32 *Hen. 8. ca. 3.* but is held to have been virtually restored by *stat. 1 Edw. 6. ca. 12.* which statute also enacts, that lords of parliament, and peers of the realm may have the benefit of their peerage, equivalent to that of clergy, for the first offence (although they cannot read, and without burning in the hand) for all offences then clergyable to commoners, and also for the crime of house-breaking, highway-robbery, horse-stealing, and robbing churches, 2 *Hales P. C.* 372. *Hob.* 294.

NOTE. The dutches of *Kingston* pleaded under this statute in bar of execution, on a conviction for *bigamy*, 14 *St. Tr.* 198.

After

After this burning the laity, and before it, the clergy were discharged from the sentence of the law in the king's courts, and delivered over to the ordinary to be dealt with according to the ecclesiastical canons. Whereupon the ordinary proceeded to make a *purgation* of the offender by a canonical trial before the bishop in person, and a jury of twelve clerks; and there first, the party himself, was required to make oath of his own innocence; next there was to be the oath of twelve *compurgators*, who swore they believed he spoke the truth; then the witnesses were to be examined upon oath, but on behalf of the prisoner only; and lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner: otherwise, if a clerk, he was degraded, or put to penance. *Rex, v. Buttridge.* 3 P. Will. 447.

HOBART, J. remarks, with indignation, on the vast complication of perjury, and subornation of perjury, in this mock trial: the witnesses, the compurgators, and the jury, being all of them partakers in the guilt; the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offence, yet was permitted to swear himself not guilty, nor was the bishop exempt from a share in the wickedness; and yet by this *purgation* the party was restored to his credit, his liberty, his lands, and his capacity of purchasing afresh, and was entirely made a new and an innocent man. *Hob.* 291. 3 P. Will. 448.

This shameful prostitution of the forms of justice, was the cause, that upon very heinous and notorious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *absque purgatione facienda*, in which situation the clerk convict could not make purgation; but was to continue in prison during life, and was incapable of acquiring any personal property, or of receiving the profits of his lands, unless the king should pardon him: but when the reformation was established, the whole ceremony was abolished.

Accordingly *stat. 18 Eliz. ca. 7.* enacts, that for the avoiding such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary

ordinary as formerly; but upon such *allowance* and *burning in the hand*, he shall forthwith be enlarged and delivered out of prison; with proviso that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. Thus the law continued until *stat. 21 Jac. 1. ca. 6.* allowed that women convicted of simple larcenies, under the value of ten shillings, should (without being called to read) be burned in the hand, whipped, stocked, or imprisoned, for any time not exceeding a year: and by *stat. 3 and 4 Will. & Mary, ca. 9.* and *4 & 5 Will. & Mary, ca. 24.* a similar indulgence was extended to women guilty of any clergyable felony whatsoever, who were allowed to claim the benefit of the statute in like manner, as men might claim the benefit of clergy, and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. *Irish statutes 11 Jac. 1. ca. 3. sect. 2. 1 Stat. at large 437. 10 Car. 1. ca. 16. sec. 3. 2 Stat. at large, 117. 9 Will. 3. ca. 7. 3 Stat. at large 373.*

Still however those men who could not read, if under the degree of *peerage*, were hanged; but by *stat. 5 Ann. ca. 6.* it was enacted, that the benefit of clergy should be granted to all those who were intitled to ask it, without requiring them to read by way of conditional merit.

But this universal lenity being an encouragement to commit the lower degrees of felony, and capital punishments being too rigorous for inferior offences, it was enacted, that when any person shall be convicted of any larceny, either grand or petit, or shall be entitled to the benefit of clergy, or liable only to the penalties of burning in the hand, or whipping, the court, in their discretion, instead of such burning in the hand or whipping, may direct such offenders to be transported to America for seven years; and if they return within that time, it shall be felony without benefit of clergy. *Stat. 4 Geo. 1. ca. 11. & 6 Geo. 1. ca. 23.*

As to the consequences of allowing the offender the benefit of clergy; they are such as affect his present interest and future credit and capacity: as having been once a felon, but now purged from that guilt by the privilege of clergy, which operates as a kind of statute pardon.

4 *Blackf.*

4 *Blackf. Comm.* 357. *Irish Stat.* 9 *Anne ca.* 6. *sect.* 5.
4 *Stat. at large*, 262.

First, the offender by [his conviction forfeits all his goods, which being once vested in the crown, shall not be afterwards restored. *Secondly*, that after conviction, and until he receives the judgment of the law, by branding or the like, or else is pardoned by the king, he is to all intents and purposes a felon. *Third*, that after burning or pardon, he is discharged for ever of that, and all other felonies before committed, within the benefit of clergy, but not of felonies from which such benefit is excluded, and this by *statutes* 8 *Eliz. ca.* 4. and 18 *Eliz. ca.* 7. *Fourth*, that by the burning or pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted. *Fifth*, that what is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all. For they have the same privileges without any burning, which others are entitled to after it: 1 *Hale P. C.* 529. *Foster* 356. 2 *Hale P. C.* 388. 3 *P. Will.* 487. 2 *Hale P. C.* 389: 5 *Rep.* 110: 2 *Hale P. C.* 389, 390.

At the *Old-Bailey sess. Decemb.* 1664, by HYDE, C. J: KELYNG, J: and WILD, Rec. *Lond.* The prisoner (his name is not reported) took exception against the witness, because he had formerly been burned in the hand for felony.

The COURT over-ruled the exception. In civil causes such persons are frequently admitted as witnesses, and it differs from cutting off ears, standing in the pillory or other stigmatizing, because those punishments make the persons infamous. But *burning* in the hand doth not-so, because it cometh in the place of *purgation* at the common law, which supposeth he might be not guilty, notwithstanding the verdict. And therefore at the common law, he that confesseth a felony could never be admitted to his purgation; for there could be no presumption of not guilty against his own confession. *Kelyng* 37, 38. *Bulst.* 155. 2 *Hawk. Pl. Cr. ca.* 33 & 37. *Styler* 388. *Vide Godb.* 288. *Vide Foxb's case*, 5 *Co.*

110. for analogous points. *Ventr.* 349. *Skin.* 578.
2 *Siderf.* 51. *Hob.* 81.

NOTE. The infamy must result from the nature of the offence, not from the punishment. Vide *Ante*. And see *stat.* 18 *Eliz.* ca. 7. by which it is enacted, that after clergy allowed, and burning in the hand, the prisoner shall be presently enlarged and delivered out of prison.

So in the KING, v. ROGER PALMER, earl of Castlemain, 32 *Car.* 2. *B. R.* for high treason. On an objection made by the earl to the competency of *Dangerfield*, and argument by *Darnell*, his counsel, who was assigned him; the court having consulted with the justice of the common pleas.

SCRAGGS, C. J. addressing the prisoner, said,—“ I will tell you what my brethren’s opinions are; both points were put to them, *First*, that *Dangerfield* was convicted of felony and burned in the hand for it: *Secondly*, that he was outlawed for felony and hath a general pardon. They are of opinion, that a general pardon would not restore him to be a witness after outlawry for felony, because of the interest which the king’s subjects have in him: but they say further, that where a man comes to be burned in the hand, there they look upon that as a kind of a more general discharge than a pardon alone would amount to, if he had *not* been burned in the hand; they say if he had been convicted of felony, and not burned in the hand, the pardon would not set him upright, but being convicted and burned in the hand they suppose he is a witness. The very attainer is taken away, and so all is sure.” 3 *St. Tr.* 46, 47.

In the KING, v. the earl of WARWICK, before the lords, 12 *Will.* 3. *March*, 1699, for the murder of *Richard Coote*, esq.

The earl offered as a witness, Mr. *French*, who had been convicted of manslaughter, in killing Mr. *Coote*, the same person for whose murder his lordship stood indicted.

The objection to the competency of the witness was, that he had not been burned in the hand, nor obtained a
pardon

pardon under the great seal, though the pardon had actually passed the privy seal.

Attorney-general. Upon the facts stated, Mr. *French* is not a witness in point of law. He has been convicted, in one respect, for the very offence for which the prisoner stands indicted, though not in the same degree as the indictment sets it forth, yet it is for the same fact. Upon this indictment Mr. *French* was tried, and was found guilty of manslaughter, prayed the benefit of his clergy, which was allowed him, but he was *not* burned in the hand. Thus stands the case in fact. Now the allowance of clergy of itself does not discharge the party from the offence, so far as to set him *rectus in curia*, and make him in all respects a person fit to have the benefit and privileges of a *probus et legalis homo*, until he has passed through those methods of setting himself right in the eye of the law, that the law hath described; and in order to set this matter in its true light, it will be necessary to open the nature of this *benefit of clergy*, and what advantage accrued to the party by having that benefit allowed him, and likewise what benefit he had by the statute that enacted the *burning of the hand*, which was *stat. 4 Hen. 7. ca. 13. Law in Ireland, by 10 Hen. 7.*

By that act the burning in the hand was of no more effect but only to shew, that the prisoner had his clergy allowed him; and that, unless he were within orders, he should have it no more than once. Before that act of parliament a person might have had the benefit of clergy several times, but that act limits it to once; and therefore in order to the having of it known, whether a man once had his clergy allowed him, who did not produce his orders, that act provides, there shall be a mark set upon him at the time of the allowance of this clergy, as a token that it was allowed him, and he was never to have it allowed afterwards; but even at that time he was to be delivered over to the ordinary to make his *purgation*. But since that act several statutes have been made about this matter; as the statute of *Edw. 6.* which enacts, that where a peer is convicted of felony within the benefit of clergy, he shall be discharged without being burned in the hand; but by *stat. 18 Eliz. ca. 7.* it is

enacted, that after the burning in the hand, the prisoner shall *not* be delivered to the ordinary, but shall be discharged; by virtue of which act, after burning in the hand, the prisoner hath made full satisfaction to the law, without that sort of purgation which was before requisite to be made; but until he be burned in the hand, or has his pardon, he is not to be discharged; it may be he may be bailed out by the judge, in order to get a pardon, but still he remains in *statu quo*, as to his being a witness, or any thing of that nature; his credit is gone until it be restored by the king's pardon, or his undergoing the punishment that the law requires; and no man would say, that where one lies under a conviction of felony undischarged by burning in the hand or pardon, that he can be a witness; he remains just as he was before, the conviction remains upon him which disabled him to be a witness, and that is the case of Mr. French.

Sir Thomas Powis, of counsel for the earl. Admitted the statute law to be as laid down; but observed that the statute of *Elizabeth* empowers the court that tried the criminal, not only to burn him in the hand, pursuant to the statute of *Hen. 7.* but also to detain him in prison for a year after; but, in his judgment, these statutes did not operate upon the restoration of his credit: for the burning in the hand, which is a mark of infamy, was never intended as a means, any more than imprisonment for a year, of restoring a man to his credit: it was only to shew he had his clergy once and should have it no more. The allowance of clergy, by the statute of *Elizabeth*, operates as a pardon; only, saith the statute, he shall not be delivered out of prison before he is burned in the hand, according to the statute of *Hen. 7.* No body can say that the continuing in prison for a year, which the court may order, though burned in the hand would, as to restoring of credit, have operated one way or other: but we insist, that the allowance of clergy sets him right in court, since purgation is abolished, and is the same thing as if he had undergone the ceremonial part of a formal purgation. It is the allowance of clergy that makes the operation or alteration in this case,

by

by virtue of the 18 of *Eliz.* for he is to have the same benefit of his clergy, as if he had been delivered to the ordinary, and purgation had been made; and now the allowance of clergy by this act, gives the same benefit to the party as purgation would have done before this act, and he is in the same state and condition as he would have been in case of a purgation, or pardon by the king.

He then cited *Holcroft's case*, 4 *Co.* The defendant was indicted and convicted of manslaughter, and he prayed the benefit of his clergy. The judges thought fit to respite their judgment therein; but his prayer was entered upon record, and then an appeal being brought against him, it came to be a question how far he had his clergy: for by the *stat. Hen. 7.* an appeal will lie, notwithstanding a conviction, if the party have not had his clergy; and in this case it was adjudged, that the party having prayed his clergy, he should have the same benefit as if the court had ordered every thing to be actually executed, which ought thereupon to be done. Then it can be no question, whether a man shall be a witness or no who has had his clergy allowed? it is so entered upon record, that the book was administered to him, and that he read as a clerk; for the party has done as much as he can, prayed the benefit of his clergy and had it allowed; and so it is entered upon record. The respiting the burning of the hand until the king's pardon be obtained, shall not sure put him in a worse condition than he would have been, if he had actually been burned in the hand.

In the case of *Seark, v. Williams*, lord HOBART speaks so fully to this matter, that it ought to end the question. He says, the statute of *Eliz.* appointing the burning in the hand without purgation, does operate as a statute pardon to all intents and purposes, and the party having now the benefit of clergy allowed, is in all respects in the same condition as if he had been acquitted. These are his words to that point: "Whosoever speaks words
" of accusation, reflecting upon a man for any offence,
" for which he was indicted and convicted, and had his
" clergy allowed, an action lies as if he had been to-
" tally acquitted from it: it is not the burning in the
" hand,

" hand, but the allowance of clergy that sets him right
 " in his credit in the eye of the law, and he is thereby
 " in the same condition in that respect, that he would
 " have been if he never had had any conviction upon
 " him." Towards the end of the case, his very words
 are these: " Though the statute saith, after burning in
 " the hand according to the statute in that behalf made,
 " he shall be discharged, and if there is no burning in
 " the hand, that makes nothing; for though it be a case
 " where the hand ought to be burned, yet it is not so
 " essential but a man may have the benefit of the statute,
 " though he be not burned; the king may pardon the
 " burning; for the burning even in an appeal, is no
 " part of the judgment, nor so much as in the nature of
 " punishment, but rather a mark to notify that he may
 " have his clergy but once," So that the statute of
Eliz. doth not abolish purgation, but gives the party all
 the benefit thereof, as if he had gone through it, and
 instead of delivering the party to the ordinary, to make
 his purgation, it says, he shall be delivered out of pri-
 son; but least it might seem to repeal the statute of
Hen. 7. as to the burning in the hand, being burned in
 the hand according to the statute in that case provided;
 by the statute of *Hen. 7.* he was first to be burned in the
 hand, and then delivered to the ordinary to make his
 purgation; but by the statute of *Eliz.* he, is first par-
 doned of his crime, by being allowed the benefit of his
 clergy, without making his purgation, and afterwards to
 be burned in the hand before he be delivered out of
 prison; so that the burning in the hand is only a condi-
 tion precedent to his getting out of prison, not to his
 being restored to his credit. The king may pardon the
 burning in the hand, and in this case he has given a par-
 don as far as the privy seal, and that is sufficient to shew
 his intention of pardoning throughout.

Hobart is followed by *Hale*, who says, clergy gives a
 man capacity to purchase goods, and to retain the pro-
 fits of his lands, and restores him to his credit, accord-
 ing to the case in *Hobart*, of *Searle* and *Williams*. So
 here clergy restores the witness to credit.

Wright,

Wright, serjeant, in reply. Admitted that a pardon restores to credit; that allowance of the benefit of clergy, and burning in the hand upon it, amounts in law to, or is equivalent to a pardon; but here is neither actual pardon nor burning in the hand; and the benefit of clergy allowed is not sufficient. There can be no pardon without the great seal; nor is clergy equivalent to pardon without burning in the hand.

In *Searle* and *Williams*, cited, it was not needful to burn the person convicted; he was a clerk in orders, and by law, exempt from burning in the hand, the *stat.* 18 *Eliz.* not requiring any person to be burned in the hand that was not before liable: and the most, *Hobart* says, is, that in case where the hand ought to be burned, it is not essential; but the party may have the benefit of the statute; that is, be discharged without burning; and the king may pardon the burning; and no doubt, if the king pardons the burning, it is as effectual as if the hand had been actually burned; for the king might pardon the whole and consequently any part.

Hale, in his Pleas of the Crown, says expressly, that burning in the hand, is now since *stat.* 18 *Eliz.* the consequent upon the allowance of clergy, which hath this effect: *First*, it enables the judges to deliver him: *Secondly*, it restores him to former capacities: *Thirdly*, it restores him to his credit; and so it puts him in the same condition as if he were acquitted. What is it that hath this effect? the allowance of clergy and burning in the hand: there is not to be a delivery of the criminal until all be done which is required by law; and it was never yet pretended, that any person could have the full advantage of the benefit of clergy, since the *stat.* 4 *Hen.* 7. until he was burned in the hand, or the burning in the hand was pardoned. To apply this, Mr. *French* was convicted of felony and manslaughter, and is neither burned in the hand nor pardoned, but he has prayed the benefit of the clergy, and has had the book given to him to try if he can read, and he certified he can read—but if the reading as a clerk, without burning in the hand or pardon of it, be not sufficient in the law to intitle him to be discharged, why should it be sufficient to restore his

his credit? it is the whole together works the discharge and restores the party.

Burroughs, v. Holcroft, has been cited. There a man was convicted of manslaughter and prayed his clergy; the court did not allow his clergy, but advised on it: this was held sufficient to bar an appeal, for if clergy had been allowed, it had clearly been a good bar; and the act of the court in advising upon the prayer, and not allowing clergy where it ought to be, shall not prejudice the party convicted, but he shall be in the same state as if clergy had been actually allowed: but here it is not pretended that Mr. *French* desired to be burned in the hand, but that was respited in favour to him, with intention that he should get the king's pardon for the burning, which is not yet obtained, and consequently he is not intitled to that benefit which the law would give him, if he was either pardoned or burned in the hand; he is not fully discharged of the conviction, and therefore ought not to be admitted as a witness.

The JUDGES being called on for their opinion—

TREBY, C. J. said, there could be no doubt, but a peer convicted of clergyable felony, would be competent without burning in the hand. Here is no pardon, but preparation for one, so these two points are out of the question. The question is, whether this commoner, being convicted of felony, and having his clergy allowed, but being unburned and unpardoned, shall be received and be allowed to be a witness—

I am of opinion he ought not—

For, whatever quality or credit he might personally be of, he is by being and remaining a felon convict rendered *infamous* in the eye of the law. Upon the conviction he lost, by the intendment of law, that credit which is necessary to a witness; and is not restored to it by the bare allowing of clergy; but is in the state as a felon convict would have been before purgation at common law.

The chief justice then stated historically and minutely the common and the statute law, respecting benefit of clergy, the incapacities it created, and the law of purgation by which the party was restored to his liberty, his goods, his chattles, the profits of his lands, and his credit

credit as a witness or juror, all of which he forfeited by conviction, but was restored to by purgation and absolution.

He denied that the allowance of clergy, by virtue of *stat. Hen. 7.* frees a man and makes him *rectus in curia*, as if he had made his purgation, or that by the statute he was first pardoned of his crime, by being allowed the benefit of clergy. He critically examined the statute of *Henry 7. Holcroft's* case, which he considered inapplicable, and *Searle and Williams*, which in his judgment confirmed this, that where a convict is liable to be burned in the hand, he is not restored and discharged without it; because the statute says, "after burning," but from henceforth the statute frees him from all future punishment: but *Hobbart* saith, that where he is not liable to burning, he shall have the said benefit immediately upon the allowance of clergy only. So it was in the case of *Searle and Williams*, for *Searle* was a clerk in orders, parson of *Heyden-German*, in *Essex*, and convicted of manslaughter. So it is, says the reporter, where the king pardons the burning. And the last words in the case clearly shews his meaning, *viz.* where the statute says, "after burning," it imports where burning ought to be.

"To me the law is evident. A peer shall have this benefit without either clergy or burning. A clerk in orders, on clergy alone, without burning. A lay clerk, not without both."

Hale has been cited, he plainly declares the same opinion, and cites the last mentioned case in proof of it. His words are these: "What is the effect of clergy allowed? in antient time the consequence was, deliver him out of prison, either to make purgation, or *absque purgatione*, as the case required. But by *stat. 18 Eliz. ca. 7.* now only burned in the hand, which hath these effects: *First*, it enables the judge to deliver him out of prison: *Secondly*, it gives him capacity to purchase goods, and retain the profits of his lands: *Thirdly*, restores him to credit." *Searle's case. Hob. 289, 291. Foxley's case, 5 Co.*

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The two books which this learned judge (*Hale*) cites, are full authorities, that it is this burning which enables the court to deliver him, and that that delivering which is then due to him, is, by good construction, in lieu of pardon, which restores him to his said capacity and credit.

To conclude. This condition precedent (burning in the hand) upon which the restitution of the witnesses credit depends, is not performed by his undergoing the said punishment, nor discharged by the king's pardoning it, and therefore he is not a legal witness. All the other judges concurred, and the evidence of Mr. French was rejected. -5 *St. Tr.* 166 to 174.

Rule the Second.

The king's pardon for burning in the hand, on a conviction of manslaughter, has the same effect in restoring the convict to competency and credit, as burning in the hand would have had; which it is agreed has, without a pardon, the power of taking away all incapacities incidental to the conviction.

For the effect of such pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence, for which he obtains his pardon; and not so much to restore his former, as to give him a new credit and capacity. 4 *Blackf. Comm.* 395.

So in the KING, v. AMBROSE ROOKWOOD, at a sessions of oyer and terminer, for the county of Middlesex, sitting in the king's-bench, Westminster, April 8, Will. 3, 1696, on an indictment for high treason.

Captain Porter, who was produced as a witness for the crown, as appeared by the record, which was read in court, had been tried for murder the 36 Car. 2, was acquitted of the murder, but found guilty of manslaughter; had not been burned in the hand, but had pleaded the king's pardon: and several parliamentary acts of pardon had passed after.

Sir Bartholomew Shower, and Mr. Phipps, of counsel for the prisoner, submitted, that a man convicted of manslaughter

manlaughter and pardoned by the king, still remains unqualified to be a witness. And they cited lord *Castlemain's* case, to shew that burning in the hand was essential, and also a case in 1 *Brownlow*, to shew that a man attainted of felony, though pardoned, cannot be of an inquest, and consequently cannot be a witness, for the one should stand as clear and unsuspected in his probity and veracity as the other, they being both sworn, he to give evidence, the other to determine upon oath: and, as lord *Coke* says, if a man be convicted of felony and pardoned, he cannot be a juryman, for though punishment be pardoned, the guilt remains, so that he is not *probus et legalis homo*; and every particular person has an interest in it, that they have clear and free persons to be jurymen and witnesses. Lord *Castlemain's* case. 3 *St. Tr.* 36. *Brownl.* 47. *Bull.* 154.

By the 11 *Hen.* 4. a man attainted cannot be a juryman, though pardoned by the king: it was objected in that case that he might be a witness, but *Jones*, justice, said it was the same reason, if he be not fit for a juryman, he is not fit for a witness; they ought to be both *probi et legales homines*. *Bullstrode* is the same; it was in the case of a prohibition for a *modus decimandi*, where the suggestion is to be proved by two witnesses, it was objected, it was not proved by two witnesses, because they were both *attainted* of felony, and though they were pardoned, yet that did not make them good witnesses in the opinion of the court.

HOLT, C. J. This is quite another case, it does not come to your points. Here is pardon upon pardon, by act of parliament.

Showers and *Phipps*. The parliament pardon is out of the case: for if the pardon from the king be a good pardon, there is no guilt for the act of pardon to work upon. We say this, a man that is actually pardoned the punishment by the king's pardon, and afterwards an act of pardon comes and pardons all offences, does nothing; for the man is not a subject of pardon, having been discharged of his punishment before. He is not an offender within the meaning of the act of parliament; there-

fore it works nothing as to him, and he stands as much disabled from being a witness as before.

HOLT, C. J. Those cases put are no authorities in this matter, for where there is a conviction of manslaughter, and the party is pardoned, that pardon of the king works in the way of discharge as much as the burning in the hand. It is the same thing. It is admitted *that* will discharge him to all intents and purposes, and so does *this* as effectually, for having his clergy, and being burned in the hand, works by way of statute pardon. The case of a jurymen is not the same with this case; but even in that case the party convicted after the king has pardoned him, is not disabled from being of a jury; but supposing that to be so, there are many cases where a man may be a witness who cannot be a jurymen. It is true, the credit of such a witness is left to the jury, but it is no objection against his being a legal witness; and it is a strange thing that because he was pardoned by the king, if that were deficient, that therefore the act of pardon should have no effect. Truly that is to say, that the king's pardon works so as to have nothing left for the parliament's pardon to work upon; and certainly the king's pardon sets him so right, that to all intents and purposes, he is as good a witness as ever he was; and if any thing remained to be done, the act of parliament has done it, and supplied the defect; but the king's pardon is sufficient.

The *attorney and solicitor-general*, for the crown, cited the case of the lord *Castlemain*, wherein *Dangerfield*, who had been burned in the hand for a felony, was held to be a legal witness; and to the same point the opinion of *Roll. Stiles* 388. And *Crosby's* case, in which *Aaron Smith* was produced as a witness, and the prisoner objected to his competency, because he had stood in the pillory, but the court said, the act of pardon did restore him to all intents and purposes, *ad literam legis*.
Ante

HOLT, C. J. In *Aaron Hill's* case the court did not decide upon the infamy of the offence, but went upon the pardon. Why the very parliamentary pardon comes from the king; the king has a full power of pardoning
and

and where he does pardon under the great seal, it has the full effect of the parliamentary pardon. A pardon before attainder prevents all corruption of blood; so that though a man forfeits his goods by conviction, yet, after a pardon, he is capable of having new goods, and shall hold them without any forfeiture whatsoever: for the pardon restores him to his former capacity, and prevents any further forfeiture. Indeed, if he had been attainted, whereby his blood was corrupted, no pardon, whether it were by the king or by the parliament, could purge his blood without the reversal of the attainder, by writ of error or act of parliament, or express words in the act to restore blood; either species of pardon makes him a new creature, gives him new capacity, and makes him to all intents and purposes, from the time of the pardon to be *probus et legalis homo*, and a good witness. Indeed, this crime might be objected against his *credit*; but it is not to be urged against the sufficiency of his evidence; that is his being a witness—captain *Porter* was sworn and examined. 4 *St. Tr.* 642. Vide the earl of *Warwick's* case. *Ante* . *Post* .

Rule the Third.

The legislature of England, taking into consideration, as the statute expresses it, that the punishment of burning in the hand persons convicted of felony, within benefit of clergy, is often disregarded and ineffectual, and may fix an everlasting mark of disgrace and infamy on offenders, who otherwise might become good subjects; hath enacted, that any person liable to such burning, may be punished by a moderate fine, at the discretion of the court, except in cases of manslaughter, or by a public or private whipping, not more than three times, and in the case of female offenders in the presence of females only; and that such fine or whipping shall have the like effect and consequences to the party, with respect to discharge or restitution to *capacity* and *credit*, &c. as if the burning had been inflicted. *Stat. 29 Geo. 3. c. 74. sect. 3. 1779.*

At common law, a person indicted of petit-larceny not being liable to be burned in the hand, was disqualified from being a witness, although the punishment of the sentence adjudged was inflicted. *The KING, v. M'KINDER.* 2 *Wils.* 18.

Rule the Fourth.

But now, by *statute*, it is enacted, that a conviction of petit-larceny, shall not incapacitate the party convicted from being a witness. *Stat.* 31 *Geo.* 3. *ca.* 35. *Irisb* 36 *Geo.* 3. *ca.* 9.

Rule the Fifth.

But a pardon from the king has no manner of force, as to the purpose of restoring capacities or competency to the convict, unless it hath passed the great seal: therefore where the objection is made to competency, by producing the record of conviction, the production of the pardon with the great seal annexed, is necessary evidence to rebut such objection. 2 *Hawk. P. C. ca.* 37.

So in the earl of WARWICK's case, before the lords, 12 *Will.* 3. before cited; a man was called as a witness, who had been convicted of felony, within the benefit of clergy, and had prayed his clergy, and it is allowed, but the burning of the hand is respited, and a warrant under the privy seal was made out for his pardon; yet the judges held, that he could not be a witness until his pardon had passed the *great seal*, and that he had produced it and pleaded it, *sub pede sigilli.* 5 *St. Tr.* 166.
Ante . *Post* . *Murphy's case.*

And in M'DONALD, v. RAMSAY, *Trinity* 21 & 22 *Geo.* 2. 1748. *Ban. Reg.* The prisoner had been convicted of high treason, 1747: but his majesty had given orders for preparing a pardon for him, on condition of his continuing abroad for life. On motion to discharge him from arrest in a civil suit: the COURT said, we cannot take notice of his majesty's *intentions* touching the pardon. The crown in cases of pardon, signifieth its pleasure finally and irrevocably by the great seal, and by that

that alone. A pardon may not pass at all; or it may upon other conditions than those suggested from the bar, or it may be a free pardon. *Fost.* 62. 1 *Wils.* 217. *S. C. Leach. Cr. Ca. 3 Edit.* 117. *Fost.* . *Murphy's case.*

And in the *KING, v. PATRICK MURPHY*, and others, *Old-Bailey, July session, 1773.* The defendants were indicted before *WILLES, J.* and *GLYNN*, serjeant and recorder, for a highway-robbery.

Silvester, counsel for the prisoner, objected to the competency of the principal witness, *William Gully*, upon the ground of his being a convict under sentence of death; in evidence of which he produced the record of his conviction; and a witness to identify his person.

Lucas, for the crown, produced the *king's sign manual*; under which the prisoner had been discharged, on his giving security to appear and plead the next general pardon that should come out.

The COURT held the objection incontrovertible; for nothing less than a pardon, under the great seal, can restore the competency of the witness, and it was impossible for the court judicially, to take notice of his majesty's intention, to pardon which is the extent of what the sign manual has signified. The JUDGES determined, in the case of the earl of *Warwick*, that if a man be convicted of felony, that is within clergy, and prays his clergy, and it is allowed, but the burning in the hand is respited, he cannot be a witness until his pardon has passed the great seal, and he has produced and pleaded it *sub pede sigilli*; for as it is for his benefit, it is presumed to be in his custody, and it would be error to grant him the benefit of it until it has been allowed: but letters under the *king's sign manual* cannot be pleaded as a pardon. *Leach Cr. Ca. 3 Edit.* 115, 116. 3 *Stamf.* 103. 2 *Hawk. Pl. Cr. 6 Edit.* 558. *Ante* .

Rule the Sixth.

The king's pardon for treason or felony, after a conviction or attainder, restores the party to his competency.

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And does so far clear the party convicted or attainted of the infamy and all the consequences of his crime, that he may not only have an action for a scandal, in calling him a traitor or a felon, after the time of the pardon, but may also be a *good witness*: because the pardon makes him as it were a new man, and gives him a new capacity and credit. 1 *Hawk. Pl. Cr. ca. 37. and ca. 46.*

HALE, to the same point says, if the king pardon these offenders, they are thereby rendered competent witnesses, though their credit is still left to the jury, for the king's pardon takes away *pœnam et culpam in foro humano*, but yet it makes not the man an honest man, and therefore he shall not be a jurymen, but yet he may be a witness, contrary to the opinion of *Coke*. 2 *Hale* 278. *Hob.* 67, 81. *Bull.* 156.

On this rule, in *Crosby's* case, *HOLT*, C. J. makes this distinction. Where there is a conviction for a criminal offence, the king cannot restore the party to his credit, but gives him credit for the future. 5 *Med.* 15. *Ante*.

In the *KING, v. THOMAS REILLY*, *Old-Bailey, July sessions, 1787*. In this case it appeared, that *John M'Daniel* had been convicted on *stat. 31 Geo. 2. ca. 10.* which makes it felony without benefit of clergy, to take a false oath, or procure any other person to take a false oath, to obtain the probate of any will, or letter of administration, in order to receive officers or seamen's wages, pay, prize-money, &c.

In the course of the trial of *John M'Daniel*, it was discovered that *Thomas Reilly*, who appeared as a witness, had suborned the prisoner to commit the offence; and he was committed to take his trial; and no judgment was passed upon the prisoner.

Shepherd and *Garrow*, counsel for the prisoner, produced the record of *M'Daniel's* conviction, and submitted, that his competency was thereby destroyed, notwithstanding the conviction had not yet been followed by a judgment.

Silvester and *Fielding* for the crown, waved the argument upon this point: and *M'Daniel* being called upon
to

to say why judgment and execution should not be awarded against him, pleaded his majesty's pardon, in bar, which was allowed.

The question therefore was, whether a special pardon, granted after conviction on this *statute*, but pleaded and allowed in bar of the judgment, restored the witness to competency; or whether it only remitted him from the punishment to which he would have been liable in consequence of an attainder.

For the prisoner it was contended, that as a pardon, by the particular manner in which it is penned, merely imports an intention on the part of the king, to discharge the party from future punishment, it was to be considered as a *charter of remission only*, and could not, by consequence and deduction, be considered as a *charter of restoration*, so as to remove the disability to which the witness had once been rendered liable, and enable him thereby to prejudice the interests of third persons, by giving evidence against them.

The counsel for the crown answered, that the king's pardon not only remits the punishment, but restores the convict to his *plenam et liberam legem*. And they relied on 2 *Hale Pl. Cr.* 278. 2 *Hawk. Pl. Cr. ca.* 33. *sect.* 132.

The COURT were decided, that in cases of felony, a pardon from the crown restores the competency of the convict; and that the verdict against *M^cDaniel* was to be considered as a conviction of a felony committed through the medium of perjury, and not as *perjury* itself.

The evidence of *M^cDaniel* was accordingly received, and the jury found the prisoner *Reilly* guilty: but judgment was respited for the opinion of the judges.

WILSON, J. in June session, 1788, informed the prisoner, that the JUDGES were of opinion, that if *M^cDaniel* had not received his majesty's pardon, some doubt might have been entertained, but that as he was pardoned, and that pardon regularly allowed, they are clear that it not only respites the convict from punishment, but entirely absolves him from the crime, and restores him completely to his former competency and credit.

The case of *Cuddenston, v. Wilkins*, is precisely in point, and decisive of the question; for it is there expressly determined, that the king's pardon doth not only clear the offence itself, but all the dependencies, penalties, and disabilities, incident to it. The JUDGES therefore are of opinion, that the testimony of *M^cDaniel* was properly admitted in evidence, and that *Thomas Reilly*, the prisoner at the bar, has been legally convicted on this indictment. The prisoner received sentence of death. *Leach Cr. Ca. 2 Edit. 361. 3 Edit. 512. Hob. 67, 82.*

The above case seems conclusively to settle the question, whether the king's pardon generally, restores the competency of the convicted party: heretofore some held, that the king's pardon takes away the punishment indeed, but doth not remove the crime, and that the turpitude of the crime remaining, is ever a presumption against his evidence. *2 Brownl. 47. 2 Bulst. 154. 2 Sid. 221. 2 Danv. Abr. 163. pl. 6. Cro. Jac. 622. 2 St. Tr. 521. 4 St. Tr. 269. Lord Castlemain's ca. 3 St. Tr. 46, 47. Antè*

Others, however, and among those GILBERT, C. B. and serjeant HAWKINS, whose opinion joined with that of HALE, constitute an authority irresistible, hold that the king's pardon restores the reputation; and the loss of reputation being part of the punishment, the king's pardon that can take off the whole punishment, must by necessary consequence, restore reputation; and that the king, as constitutional guardian of the life, liberty, and estate of his subjects, is the best judge of the consequence of his pardon. *2 St. Tr. 269. 3 St. Tr. 585, 610, 552, 553. 4 St. Tr. 610. Gilb. Evid. by Loft, 260.*

So that if any person guilty of these crimes by which the credit is lost, be afterwards pardoned, it must be supposed he hath repented of his fault and hath returned to a better mind, and therefore that his evidence is not dangerous to the life, liberty, or estate of the subject. *Ibid. 2 Hawk. Pl. Cr. ca. 37.*

But, as has been repeatedly said, though a man convicted of an infamous crime be re-admitted to competency, by the royal pardon, a jury, doubtless, will exercise their discretion

discretion as to the *credit* due to him under these circumstances, according to the nature of the offence of which he was pardoned.

Rule the Seventh.

But though the king's pardon will remove a man's disability to be a witness, in all cases whatsoever, wherein such disability is only the consequence of the conviction or judgment against him; yet such disability is *not* removed by the royal pardon, where it is an *express part of the judgment*, as it is in conspiracy at the suit of the king, and in perjury on the statute. 2 Hawk. Pl. Cr. ca. 46.

HAWKINS rests the above distinction on the opinion of HOLT, C. J. in the *King, v. Crosby*; in which case the chief justice is reported to have said, in the *King, v. Wicken Ford*, the question being, where the king could pardon a disability, and where not: HOLT, C. J. took this difference, *viz.* where the disability is only the consequence of the judgment, the king may pardon it, but where the disability is part of the judgment itself, the king's pardon will not take it away. Therefore if a man be convicted of perjury on the statute, the king's pardon will not restore, for it is not a consequence but part of the judgment, *viz. Quod imposterum non sit receptus ut testis. Co. Entr. 300. 2 Salk. 689. Ante*.

As in the *KING, v. GRIEPE, Mich. 9 Will. 3. at bar, Banc. Reg.* On an information for perjury: and it was objected, that this information is for perjury at common law, which is punishable, though it be not corrupt or material to the issue, or prejudicial to any.

The COURT answered, that the statute only inflicts a greater punishment, but does not alter the nature of the offence. And,

HOLT, C. J. said, that perjury at common law was an infamous crime, and the statute 11 Hen. 7. ca. 25. supposes so. And in the *Mirror of Justices, tit. infamy*, perjury is mentioned. So *Fortescue de Laud. Angl.* There is no reason therefore for any diversity in the crimes upon statute or at common law; but the punishments are

different, for in convictions upon the statute, *disability* is part of the judgment, but at common law it is only a consequence, and therefore, at common law, the king may pardon and restore the convict to his competency, but upon the statute he *cannot*: but he must reverse the judgment or he cannot be restored. 1 *Ld. Raym.* 256. *S. C.* 12 *Mod.* 139. *Comb.* 459. 2 *Salk.* 512. *Carth.* 421. *Holt.* 535. *Comy. Rep.* 43. 5 *Mod.* 343. 3 *Mod.* 342.

Therefore the courts of law now hold, that on perjury at common law, the party pardoned may be a witness, because the king has power to take off every part of the penalty, and this effectually comprizes a power to discern whether it is proper that the offender should be restored to credibility: but if a man be indicted for perjury on the statute, the king cannot pardon so as to discharge his incompetency: for the king is excluded and divested of that prerogative by the express words of the statute, which are these: "the oath of such person so offending, is not to be received in any court of record," or as the statute elsewhere expresses it, "the offender from thenceforth to be discredited, and disabled for ever to be sworn in any court of record." *Engl. stat.* 5 *Eliz. ca.* 9. *Irish stat.* 28 *Eliz. ca.* 2. *sect.* 1. *Gilb. La. Evid. by Loft,* 260.

Rule the Eighth.

In every pardon under the great seal, the capacities of the convict are restored immediately on the pardon being recorded; and if the pardon be conditional, then in like manner after the performance of the condition, the competency of the party to be heard as a witness is restored, or legally created. *Gilb. La. of Evid. by Loft,* 259.

Rule the Ninth.

By a statute pardon every one within that pardon is restored to competency, and is to be considered as received into society as a person of credit; for no man can be punished

punished in his reputation, when the public voice hath discharged him from his offences. *Gilb. La. of Evid.* 259.

And therefore, as has been stated, the convict, after pardon, may have an action of scandal against any person accusing him of the crime for which he was convicted. *Ante*.

Rule the Tenth.

The certificate of the clerk of the crown, peace, or assizes, of a defendant having had the benefit of clergy, or of the statute, is evidence thereof on a subsequent indictment. *Irish stat.* 9 *Will.* 3. *ca.* 7. *sect.* 7. and 9 *Ann.* *ca.* 6. *sect.* 5. 5 *Stat. at large*, 262.

CHAPTER XX.

On the Competency of Judges and Jurors.

Rule the First.

It is no exception to a person giving evidence either for or against a prisoner on his trial, that he is one of the judges or jurors. 2 *Hawk. P. C.* *ca.* 46. 7 *Edit.* p. 608.

And on the trial of the REGICIDES, *Old-Bailey*, December, 12 *Car.* 2. *Ann.* 1660, secretary *Morris*, and Mr. *Annesley*, president of the council, were both in commission for the trial of the prisoners, and sat upon the bench; but there being occasion to make use of their testimony against *Hacker*, one of the prisoners, they both came off from the bench and were sworn, and gave evidence, and did not go up to the bench again during that man's trial. And it was agreed by the court, they were good witnesses, though in commission, and might be made use of. 2 *Hawk. P. C.* *ca.* 46. *Kelyng* 12, 1 *Siderf.* 133. 2 *St. Tr.* 384.

Rule

Rule the Second.

Judges who have sat on one trial, may be called upon as witnesses for a defendant on a subsequent trial, for though a judge cannot take notice of any thing not proved, he may and ought to be a witness, if he knows any thing material of the matter tried before him and others. 4 *St. Tr.* 85, 202.

So in the *KING, v. TITUS OATES, Easter, 1 Jac. 2. 1685. B. R.* The defendant, on his trial for perjury, called on MONTAGUE, C. B. who had sat as a commissioner of *Oyer and Terminer*, at the *Old-Bailey*, on the trials of *Ireland, Whitebread* and *Langborn*, to give testimony, that the judges on those trials had received satisfaction from the fulness and fairness of the evidence then delivered. 4 *St. Tr.* 40.

So in lady IVY's case, *Trinity, 36 Car. 2. B. R.* before JEFFERIES, C. J. Mr. Baron Gregory was called on as a witness, to prove his perusal of certain deeds where he was counsel. 7 *St. Tr.* 580, 597.

And in the *KING, v. PETER FINERTY*, at a commission of *Oyer and Terminer*, &c. for the city of *Dublin*, *December, 38 Geo. 3.* before DOWNES, J. The defendant was tried for a libel upon government, and lord YELVERTON, C. B. called by him as a witness, was sworn and examined, not only to his hand writing at the foot of some affidavits, but to facts respecting a recommendation from the jury, who were impanelled on the trial of *William Orr*, who had been tried and convicted before his lordship of a capital felony, in administering the oath of an united Irishman. His lordship gave his evidence on the table. *Finerty's Trial by Ridgeway, 51. M. S. date.*

Rule the Third.

Jurors may be examined not only to the character of prisoners, but to facts in the cause; but they must be sworn as other witnesses are; and they must give their evidence in open court, in the usual way.

CHAPTER

CHAPTER XXI.

Of the obligation on Counsel, Attornies, Solicitors, and Agents, to keep secret the communications of their Client, respecting the Suits in which they are retained: and of the privilege claimed by persons of other descriptions, not to disclose in evidence secrets communicated to them.

Rule the First.

NEITHER counsel, nor attornies, ought to be permitted to discover the secrets of their clients, though they offer themselves as witnesses for that purpose.

This is the privilege of the *client*, and not of the counsel or attorney; and it is founded on the policy of the law, which will not permit any person to betray a secret with which the *law* hath entrusted him, *Bul. N. P.* 284.

But the general rule seems derived from hence. That formerly, in the simpler state of society and laws, persons appeared for themselves, and conducted their own claims and defences, without needing the assistance of men educated to the formal practice of the law. When the extension of property, the increase of laws, the magnitude, number, and subtilty of legal questions, rendered this no longer safe or practicable, the attorney, as the name indicates, became the legal representative of his client in the cause. The answer of the agent was the answer of the principal; and whatever the party could have done personally was conclusive, when transacted in his place by his legal proxy. It was therefore conversely just, that the attorney should neither be compelled nor permitted to answer questions pointed at the disclosure of facts, which to divulge, would be inconsistent with the nature of such representation, being of that kind which the party could not have been obliged to answer. *Reading on the statutes, Geo. 2. by Rayner* 111.

Rayner is not the first lawyer who has derived the rule of professional confidence, from the nature of professional

professional situations. In *ANNESLEY, v. the earl of ANGLESEY, Exchequer, Ireland, at bar*, the RECORDER of Dublin, arguing for the defendant, says, formerly suitors appeared in court themselves, but as business multiplied and became more intricate, and titles more perplexed, both the distance of places and increase of business, made it absolutely necessary that there should be a set of people, who should stand in the place of the suitors, and these persons are called attornies. Since this has been thought necessary, all people, and all courts, have looked upon such confidence between the party and attorney to be so great, that it would be destructive to all business if attornies were to disclose the secrets of their clients. 9 *St. Tr.* 387.

So in the *KING, v. WATKINSON, Mich. 13 Geo. 2. Nisi Prius*, indictment for perjury in an answer in chancery. The master who took the answer was called, but could not identify the person. The prosecutor insisted upon examining the *defendant's solicitor*, who was present at putting in the answer, and had been subpoenaed; but he insisting on his privilege, the chief justice would not compel him to be sworn, so the defendant was acquitted. 2 *Stra.* 1122.

☞ The Reporter put a query upon this decision, the evidence required being a fact in the *knowledge* of the solicitor, and no matter of secrecy communicated to him by his client. Vide *Poff*, rule 5.

Rule the Second.

The general rule above laid down, is confined to such facts as have been communicated by the client to his counsel, attorney, or solicitor, respectively, in giving professional instructions in the cause in which they are retained; for the counsel, or attorney, may be examined to a fact of their own knowledge, which they might have known without being counsel or attorney in the cause. *Bull. N. P.* 284.

As in lord SAY and SEAL's case, *Mich. 10 Anne, B. R.* Ejectment at bar, to prove a recovery good, a deed directing the uses of the recovery and the fine, to wit, the
the

the chirograph of the fine and common recovery were produced. And lord *Say* and *Seal's* counsel desired to call one *Knight*, an attorney at law, to prove, that though the deed was dated October the twenty-third, it was not executed until five months after, to wit, in March.

The attorney was the person intrusted in suffering the common recovery.

The counsel for the heirs at law objected : because as an attorney has a privilege not to be examined as to the secrets of his client's cause ; so, the attorney's privilege was likewise the client's privilege ; for the client instructs the attorney with the secrets of his cause upon confidence, not only that he *will* not, but also that though he *would*, yet that he *should* not be admitted by the law to betray his client, and for this *Holbeach's* case was relied on.

The court were of opinion, that *Holbeach's* case was good law ; and that an attorney's privilege was the privilege of his client ; and that an attorney though he *would*, yet *should* not be allowed to discover the secrets of his client. But notwithstanding this, they thought *Knight's* evidence was to be received ; for that a thing of such a nature as the time of executing a deed, could not be called the secret of his client ; that it was a thing he might come to the knowledge of without his client's acquainting him, and was of that nature, that an attorney concerned, or any body else, might inform the court of. *Knight* was sworn. 10 *Mod.* 40.

So in *ANNESLEY, v. the earl of ANGLESEY, Mich.* 16 *Geo.* 2. 1743, *at bar*, in the *exchequer of Ireland*.

Ejectment. A question arose, whether *John Giffard*, an attorney, who had been twenty years professionally employed by the earl of *Anglesey*, should be permitted to give in evidence, a *conversation* which he had with that nobleman, respecting a prosecution against Mr. *Annesley*, for murder ; from whence it would appear, that the earl of *Anglesey* privately took an active part to prosecute him to conviction, in order that he might be hanged, and the earl thereby be freed from his claims to the estate, for which the ejectment was brought.

To this it was objected, that the witness having been attorney to the earl of *Anglesey*, he was to keep the secrets of his client, and ought not to be permitted to disclose them, and, as authorities in point, there were cited *Crofts, v. Pickering*. 1 Vent. 197. And *lord Boy and Seal's case*. *Ante*.

After this question had been most learnedly and elaborately argued, the COURT determined to the following effect.

Bowes, C. B. (afterwards chancellor) said, the public are interested in the event of this question, so far as it may affect the necessary confidence between the client and his attorney or agent; and caution should be used in fixing bounds to that trust. The proper way will be, to determine this and every like case, upon their own circumstances. What has been urged to take the present case out of the general rule was, that the conversation to which the plaintiff's counsel would examine Mr. *Giffard*, was neither in any cause wherein he was concerned for the defendant, or relative to any in which he was consulted, or intended to be employed by the defendant. If so, the question will be—"Whether an attorney shall be permitted to disclose the general conversation he had with his client, without relation to him as his attorney?" Now, admitting the policy of the law, in protecting secrets disclosed by the client to his attorney, to be as has been said, in favour of the client, and principally for his service, and that the attorney is *in loco* of the client, and therefore his trustee, does it follow from thence, that every thing said by a client to his attorney falls under the same reason? I own I think not; because there is not the same necessity upon the client to trust him in one case as in the other, and this the court may judge from the particulars of the conversation. Nor do I see any impropriety in supposing the same person to be interested in one case as an attorney and agent, and in another as a common acquaintance. In the first case, the court will not permit him, though willing to discover what came to his knowledge as an attorney, because it would be in breach of that trust, which the law supposes to be necessary between him and his employer: but

but where the client talks to him at large as a friend, and not in the way of his profession, the court is not under the same obligations to guard such secrets, though in the breast of an attorney.

The case of *Cutts* and *Pickering* restrains professional confidence to what came to the attorney's knowledge as attorney; and so is the case of lord *Say* and *Seal*: the evidence to which the attorney was there produced being to the defective execution of a deed, to make a tenant to the *præcipe* for suffering a recovery, in which the witness had been employed as attorney, which was the secret of his client's cause. I found my opinion upon the nature of the testimony proposed, which appears to have been casual conversation between the witness and the earl of *Anglesey*, not necessary to have been communicated by his lordship: and as to the private trusts between man and man the court cannot interpose. I therefore think the witness may be examined to the defendant's declarations. 1 *Ventr.* 179. *Ante* 242.

MOUNTNEY, B. was of opinion, that the evidence ought to be received, and that upon the very principles laid down, and the authorities of the cases cited by the defendant's counsel. He admitted, that attorneys ought to keep inviolably the secrets of their clients, and that for the reasons offered by the recorder of Dublin. That is to say, that an increase of legal business, and the incapacity of parties to transact that business themselves, made it necessary for them to employ (and as the law properly expresses it, *preponere in loco suo*) other persons who might transact that business for them. This necessity introduced with it the necessity of what the law hath justly established, an inviolable secrecy to be observed by attorneys, in order to render it safe for clients to communicate to their attorneys all proper instructions for the carrying on of those causes entrusted to their care; and keeping this original principle in view, it cannot be difficult to determine either the present question, or any other that may arise on the same head. On the other hand, whatever is not necessary to that purpose, the attorney is at liberty, and in many cases ought to disclose.

Dawson, B. coincided, and on the same grounds.
9 *St. Tr.* 380.

Rule the Third.

A counsel or attorney may also give evidence of facts which came to their knowledge previous to their being employed. *Bull. N. P.* 284.

Rule the Fourth.

A counsel or attorney may give evidence of facts which came to their knowledge before retainer in the cause depending; for as to such matters they are clearly in the same situation as any other person, *Bull. N. P.* 284.

Rule the Fifth.

So if the counsel or attorney were present when the client was sworn to any judicial documents; upon an indictment for perjury, upon such swearing, they would be competent to prove the fact of taking the oath; for it is a fact of his own knowledge, and no matter of secrecy committed to him by his client. *Bull. N. P.* 284.

This rule answers the query to the KING, *v.* WATKINSON, and shews the decision in that case to be erroneous, 2 *Str.* 1122. *Ante* rule 1. p.

Rule the Sixth.

So also if a counsel or attorney be witness to a deed produced in a cause, she shall be examined as to the time it was executed, Lord SAY and SEAL's case. *Rule* 2. *Ante*.

And if an attorney, who is such subscribing witness, refuses to give evidence of his attestation, &c, upon service of a subpoena upon him, the court out of which the record issues, will grant an attachment against him.

This is settled in DOE, *ex dim.* JUPP. *v.* ANDREWS, *Trinity*, 18 *Geo.* 3. on a rule to shew cause, why on such a refusal an attachment should not be granted.

Morgan

Morgan and Lade shewed cause. *Dunning* in support of the rule.

LORD MANSFIELD said, by attesting an instrument, a man pledges himself to give evidence of it whenever he is called upon. His being attorney on the other side is no reason for his breaking his engagement with the plaintiff. An attorney has no privilege to refuse to give evidence of collateral facts. I have known an attorney obliged to prove his client's having sworn and signed the answer upon which he was indicted for perjury. I think the judge who tried the cause would have been warranted in committing this man. *Cowper* 846.

Rule the Seventh.

An attorney may also be called to prove his client's handwriting to a note or other instrument; and this appears to be the common practice. *Espin. N. P.* 719.

Rule the Eighth.

An attorney is not restrained by any rule of law from giving evidence of a conversation between him and his clients, touching the justice of the cause after it has been concluded.

So ruled in *CORDEN, v. KENDRICK, Mich. 32 Geo. 3. B. R.*

An action had been brought some time before by the present defendant, as indorsee of a promissory note for 150*l.* against present plaintiff as the maker; in which case interlocutory judgment had been signed, a writ of inquiry executed, a compromise entered into, and a warrant of attorney executed for one hundred and fifty pounds.

Between the time of delivering the warrant of attorney and the money becoming due, *Kendrick* told *Allen*, his attorney in the suit, that he had only given ten pounds in cash and his promissory note for it, and that it was a lottery transaction. This action was now brought to recover back the money so paid, on the ground of the want of consideration, and in proof that that was known

to *Kendrick* at the time he took the note. *Allen* was called as a witness at the trial, to speak to the conversation abovementioned.

Lord KENTON, C. J. after argument upon his incompetency admitted him, and a verdict passed for the plaintiff.

Law renewed his objection, and moved for a new trial, on the ground that *Allen* had been improperly permitted to give evidence of the conversation between him and his client, contending that *Allen* fell within the rule of law, which prohibited an attorney from betraying the confidence placed in him by his client, which confidence lasts so long as any proceedings may be had in the cause. Here the proceedings were not completely at an end when the conversation was held. The party might have proceeded to judgment in the original suit, and the attorney had still his lien for the costs. So that the relation of attorney and client in respect to the parties to the original suit, was not determined at the time when the communication was made by *Kendrick* to *Allen*, the attorney.

Lord KENTON, C. J. The difference is, whether the communications were made by the client to his attorney in confidence, as instructions for conducting his cause, or a mere *gratis dictum*. The former was not the case here: on the contrary, the purpose in view had been already obtained; and what was said by the client was in exultation to his attorney for having obtained his suit. *Rule refused.* 4 Term. Re. 431. Vide *ANNESLEY, v. earl of ANGLESEY.* Ante 241.

Rule the Ninth.

Where the party calls upon his attorney for a witness, the other party may cross examine him; but that must be only relative to the same matter, and not to the other points of the cause.

As in *VAILLANT, v. DODERMEAD*, before lord HARDWICKE, chanc. 1742. The defendant having examined Mr. *Bristow*, his clerk, in court, the plaintiff exhibited interrogatories for cross examining him, to which he demurred,
for

William Handley would have been employed by him, as the agent of the party which was directly involved in the matter which were called for, in the case, and fix *William Handley's* name. This privilege exists even though it is not upon the record. In the bribery, *Reynolds*, who had known something that he had learned from *Patric*, but Mr. Justice refused him to give the evidence, and his anxiety to reveal the secret. In *Madam du Barre's* case, the person who had acted as the agent of the defendant and their attorney, to the effect that had been held

and the interpreter as standing in the place of the attorney himself; and I have said "the attorney."

Handley, contra. *William Handley* was the defendant's attorney; and the possession of the letter which the defendant had one of the things which he extended to more than one person, great mischief in the case, and the agents would

be able to get from the evidence the name of the person who could not be the agent of the privilege of a client's attorney for him; in the case, farther, the case of *Handley* has been pressed. But if the name was imparted to him in the case, even affecting the case. 9 St. Tr.,

Ante 248.

to all cases of the hands of an

in a civil or criminal cause, to know whether parties were married, or whether a child was born, to say that his introduction to the parties was in the course of his profession, and in that way he came to the knowledge of it. I take it for granted, that if Mr. *Hawkins* understands *that*, it is a satisfaction to him, and a clear justification to all the world. If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour, and great indiscretion; but to give that information in a court of justice, which by the law of the land he was bound to do, will never be imputed to him as any indiscretion whatever.

The LORDS agreeing with lord *Mansfield*, the witness was examined.

Rule the Eleventh.

A peer has no stronger claim to privilege, when called upon as a witness, than a commoner; and must give full and unreserved answers to all questions put to him relative to the points in issue, which a commoner would have been bound to answer. 11 *St. Tr.* 246.

As in the *KING, v. the dutchess of KINGSTON*, before cited. The *solicitor-general* asked lord *Barrington*, "Did you ever hear from the lady at the bar that she was married to Mr. *Hervey*?"

LORD BARRINGTON addressed the court, "My lords, I came here in obedience to your lordships summons, ready to give testimony to any matter that I know of my own knowledge, or that has come to me in the usual way; but if any thing has been confided to my honour, or confidentially told me, I do hold, that, as a man of honour, as a man regardful of the laws of society, I cannot reveal it."

The dutchess of *Kingston* offered to release lord *Barrington* from every obligation of honour.

LORD CAMDEN. I understand from the bar, that rather than your lordships should be perplexed with any question that may arise upon the noble lord's difficulties in giving his evidence, the counsel will wave the benefit of his evidence in the cause. If they think that safely
and

And without prejudice to this prosecution, they may venture to give up that evidence, your lordships will acknowledge the politeness of the surrender. But give me leave to make one remark upon this proceeding, and to hope that your lordships, sitting in judgment on criminal cases, the highest and most important to the lives, liberties, and properties, of your lordships, that you shall not think it befitting the dignity of this high court of justice, to be debating the *etiquette* of honour, at the same time when we are trying lives and liberties.

The laws of the land are to receive another answer from those who are called to depose at your bar, than to be told, that in point of honour and of conscience, they do not think that they acquit themselves like persons of that description when they declare what they know. There is no power or torture in this kingdom to wrest evidence from a man's breast who withholds it; every witness may undoubtedly venture on the punishment that will ensue on his refusing to give testimony. As to casual points, how far he should conceal or suppress that which the justice of his country calls upon him to reveal, that I must leave to the witnesses own conscience.

The sense of the house being taken, on adjournment, whether the question should be put,

The lord high STEWARD, on the return of the LORDS into the house, from their chamber of parliament, informed the witness (lord *Barrington*) in the same manner as a witness would have been informed in any other court, that the judgment of the house was, "That he " was bound by law to answer all such questions as " were put to him."

The counsel for the crown, and those for the prisoner, declined asking any question of the witness, but lord *Radnor* persevered, and vindicated the authority of the court, by interrogating lord *Barrington* as to the marriage of the prisoner with lord *Bristol*, and her having issue by that marriage. 11 *St. Tr.* 246.

Rule the Twelfth.

The exemption from giving evidence being the privilege of the client, is strictly confined to the three professional characters of barrister, attorney, and agent.

In *WILSON, v. RASTELL, Trinity, 32 Geo. 3. B. R.* Action to recover penalties on the statute against bribing voters at elections. At the trial, before THOMPSON, B. at Nottingham assizes. *William Handley*, an agent to the defendant on the election, was examined to certain letters received from the defendant, respecting the election, and these letters were proved to be in the hands of *B. Handley*, an attorney. *B. Handley* proved that he had received those letters from a Mr. *Handley*, who had them from *William Handley*, who knew of his having them, and desired him to destroy them. He was not concerned as attorney for *William Handley*, (nor could he, being under sheriff) in any cause whatever, neither had he employed any attorney for *William Handley*, but *William Handley* had consulted him confidentially in his profession; and he had applied to him before and after the receipt of the letters: that he had consulted both with *William Handley's* attorney, by his direction, and with *William Handley* himself, and that these letters were communicated to him in consequence of the defendant's consulting him professionally.

The witness objected to producing the letters, on the foundation of his profession of an attorney, by which he conceived himself bound to withhold them; and the judge thought he was bound so to do. On a rule *Nisi* for a new trial—

Erskine, Dagnell, Coke, Lane, and Clarke, shewed cause. They contended, that *B. Handley*, if not the attorney on record, stood in the same situation both to the defendant and *William Handley*, and therefore could not be called upon to betray the confidence reposed in him, by the production of the letters in question. He described himself as the confidential, professional adviser of Mr. *Handley*; and that it was with a view to the protection of his client, that he had possessed himself of the

the letters; for that as *William Handley* would have been liable for any bribery committed by him, as the agent of the defendant, his interest was directly involved in the production of those letters which were called for, in order to prove such agency, and fix *William Handley's* acts upon the defendant. This privilege exists even where the attorney called is not upon the record. In one of *Petrie's* causes for bribery, *Reynolds*, who had been *Petrie's* attorney, though not so at the time of the trial, was called to prove something that he had learned in a confidential conversation with *Petrie*; but Mr. justice *Buller* would not suffer him to give the evidence, and strongly reproached him for his anxiety to reveal the secrets of his former client. In madam *du Barre's* case, the court would not permit the person who had acted as *interpreter* between the defendants and their attorney, to be examined as to the conversation that had been held between them.

LORD KENYON. I considered the interpreter as standing in the same situation as the attorney himself; and I said, that "he was the organ of the attorney."

Mingay, Garrow, and Brough, contra. *William Handley* declared that he was not the defendant's attorney; and it is plain that he did not get possession of the letters in that character. Besides, the defendant had one attorney; and if the privilege could be extended to more than one, it would be attended with great mischief in cases like the present; for then all election agents would have their mouths shut.

LORD KENYON. It expressly appears from the evidence of *William Handley*, that he was *not*, nor could not be employed as an attorney, and the privilege of a client only extends to the case of the attorney for him; in order to shew it may be extended farther, the case of confidence reposed in a friend has been pressed. But if a friend could not reveal what was imparted to him in confidence, what is become of many cases even affecting life. Among others *Dr. Ratcliff's case*. 9 St. Tr. 582. Vide *dutche's* of *Kingston's case*. Ante 248.

If the privilege now claimed, extended to all cases and persons, lord *William Russell* died by the hands of

an assassin, and not by the hands of the law, for his friend, lord *Howard*, was permitted to give evidence of confidential conversation between them: all good men indeed thought, that he should have gone almost all lengths, rather than have betrayed that confidence; but still if the privilege extended to such a case, it was the business of the court to interfere and prevent the evidence being given. 3 *St. Tr.* 715.

BULLER, J. The privilege is confined to the cases of *counsel*, *solicitor*, and *attorney*; but in order to raise the privilege, it must be proved that the information, which the adverse party wishes to learn, was communicated to the witness in one of those characters, for if he be employed merely as a steward, he must be examined. It is indeed hard, in many cases, to compel a friend to disclose a confidential conversation, and I should be glad, if by law, such evidence could be excluded. It is a subject of just indignation, where persons are anxious to reveal what has been communicated to them in a confidential manner. In *Petrie's* case, his former attorney, who had been dismissed before the trial, wished to give evidence of what he knew relative to the subject, *while he was concerned as the attorney*. I would not suffer him to be examined, he acquired his information during the time he had acted as attorney, and the privilege of not being examined to such points, was the privilege of the party, not of the attorney; and that privilege never ceases at any period of time. In such a case it is not sufficient to say, the cause is at an end; the mouth of such a person is shut for ever. The distinction is now well settled, it is that the privilege extends to those three enumerated cases at all times, but that it is confined to these cases only. *Lindsay, v. Talbot.* *Bull. N. P.* 284.

Ante

There are cases to which it is much to be lamented, that the law of privilege is not extended, those in which medical persons are obliged to disclose the information which they acquire by attending in their professional characters. The point was very much considered in the dutchess of *Kingston's* case, where sir *Caspar Hawkins*, who had attended the dutchess as a medical person, made the

the objection himself, but was over-ruled. 11 *St. Tr.* 243. Vide *Ante* 247, 248.

He then examined the particular facts of the case, and concluded by saying, that as *B. Handley* was neither the attorney of *William Handley*, nor of the defendant, he was improperly prevented from producing the letters in question.

GROSE, J. concurred, and the rule was made absolute. 4 *Term. Rep.* 753.

Rule the Thirteenth.

In cases of high treason, to conceal confidential communications, is in contemplation of law a crime, not only as being a misprision of treason, but a breach of the duty of allegiance, whether the oath be taken or not.

If the oath be taken, the concealment of treason against the king, is not only a breach of allegiance, but of a moral and a religious obligation, by the commission of perjury, part of the oath being, "*not to hear of any ill or damage intended the king, without defending him therefrom!*" And, as is expressed in the oath of abjuration, introduced in the reign of king WILLIAM the third, "*engaging to support the king to the utmost, and promising to disclose all traiterous conspiracies against him.*"

But the wife is not bound to disclose the treason of her husband, though she may be obliged to give evidence against him, on a trial for high treason. Vide *Ante* 160.

Rule the Fourteenth.

A clerk attending on a grand jury shall not be allowed to reveal that which was given in evidence before the inquest. The jurors themselves being sworn to keep secret all that passes before them. *Vin. Abr.* 38.

So in *CATHARINE O'BRIEN BUTLER, v. MOORE*, and wife, and others, at the *ROLLS, Ireland*, 24 February, 1802, a most serious question was determined, respecting the privilege claimed by *Roman catholic priests*, to refuse answering interrogatories, where the facts sought to be disclosed is communicated to them in confidence.

In

In this case a bill was filed, praying to be decreed to the estates of the late lord *Dunboyne*; the plaintiff claiming the same as heir at law, and alledging the will under which the defendant claimed was a nullity, lord *Dunboyne* having been a popish priest, and having conformed and relapsed to popery, which deprived him of power to make a will.

Issue was joined: and the plaintiff produced the reverend Mr. *Gahan*, a clergyman of the church of Rome, to be examined, and interrogatories to the following effect, were amongst others exhibited to him: "What religion did the late lord *Dunboyne* profess, from the year 1783, to the year 1792? what religion did he profess at the time of his death, and a short time before his death?" The witness answered to the first part, *viz.* "That lord *Dunboyne* professed the protestant religion during the time, &c." but *demurred* to the latter part, in this way—"That his knowledge of the matter inquired of (if any he had) arose from a confidential communication made to him in the exercise of his clerical functions, and which the principles of his religion forbid him to disclose: nor was he bound by the law of the land to answer."

Duquerry, Ponsonby, Plunket, J. Ball, and Bellew, supported the demurrer. They argued that the law, from principles of policy, allowed a confidence which was not to be betrayed: and instanced the cases of barrister and client; attorney and client; husband and wife; magistrate and informer; grand juror, &c. These they said were analogous cases, and courts of justice would not restrain the exercise of religious duties, by compelling a disclosure of what was confidentially communicated by a repentant sinner to the minister of God. The Roman catholic religion was not only tolerated, but sanctioned by the legislature, and it was unreasonable to say, that contradictory duties were imposed. *First*, that a Roman catholic clergyman should exercise his religion, and then be called upon to violate the tenets of that religion, by betraying the confidence reposed in him.

Burston,

Burston, Saurin, Curran, O'Grady, and J. Lloyd, contra. Observed that the claim of exemption from giving evidence is scrutinized with a jealous eye; and the person relying upon it, must establish his right, by shewing a positive law or express authority. The cases alluded to establish nothing beyond the particular character stated in them; and there was no instance in the history of the law of such a claim as the present. It should therefore be suppressed as unprecedented, impolitic, and dangerous.

MASTER of the ROLLS, (sir *Michael Smith*, bart.) Thought there was no difficulty in the case, though it had run into a great length of discussion, which he indulged, as being most likely to give satisfaction upon a question which seemed to involve something of a public feeling. But he was bound to over-rule the demurrer. It was the undoubted legal constitutional right of every subject of the realm, who has a cause depending, to call upon a fellow subject to testify what he may know of the matters in issue; and every man is bound to make the discovery, unless specially exempted and protected by law. It was candidly admitted, that no special exemption could be shewn in the present instance, and analogous cases and principles alone were relied upon: and, there was no doubt, that analogous cases and principles were sufficient for judicial determination. But the principle must be clear as light, and the analogy irresistably strong. That clearness of principle and strength of analogy did not appear in this case, and demurrers of this nature being held strictly, he was obliged to over-rule it. *M. S.*

He cited *Vaillant, v. Dodermead. 2 Atkyns 524.*

CHAPTER

CHAPTER XXII.

Of the privilege which the Law gives to Witnesses, by protecting them from answering Questions which tend to seek accusation—though they are sworn to give evidence of the whole truth.

Rule the First.

A WITNESS shall not be asked any question, the answering to which might oblige him to accuse himself of a crime. 2 Hawk. Pl. Cr. ca. 46.

As in the KING, v. NATHANIEL READING, *commissioner of Oyer and Terminer*, 31 Car. 2. for a misdemeanor, 1697.

The COURT informed the prisoner, that if he offered to ask any question of the witness (*Bedlow*) on his oath, to make him accuse himself, it must be opposed. And that as a pardon which he had from the crown, for the offence imputed to him set him right, he should not be called upon to calumniate himself. 2 St. Tr. 822, 1035. *Taiborough's case*.

So in the proceeding against the earl of SHAFTSBURY, *Old-Bailey*, Decemb. 33 Car. 2. 1681. NORTH, C. J. said a man must not be impeached but where he may answer for it: a pardon puts him in *statu quo*, and he is not to defame or accuse himself. 3 St. Tr. 439. *Ante*

So in the KING, v. TITUS OATES, *East*. 1 Jac. 2. 1685. B. R. for perjury. OATES asked of the witness *Hilsley*, a Roman catholic witness, what business he had at St. Omer's, six years before.

The attorney-general objected to the question, and JEFFERIES, C. J. said, it could not be put, because it might make the witness obnoxious to some penalty, and no man is to be made liable to punishment by ensnaring questions.

The same witness being again asked by *Oates*, by virtue of his oath, whether the house where he lodged at
St.

St. Omer's, was not governed by priests and jesuits, the chief justice said, it was not a question fit to be asked, and told the witness he was not bound by his oath to answer it. 4 St. Tr. 9, 10.

In the KING, v. sir JOHN FRIEND, *Old-Bailey, sessions, March, 8 Will. 3.* 1695. High-Treason. The prisoner desired to know from Mr. Porter, a witness, whether he was a Roman catholic or not?

The solicitor-general objected, desiring, that before he answered the question, he might be acquainted with the danger of it; he was bred a protestant, and then turning Roman catholic, he was subject to a severe penalty.

HOLT, C. J. (the other judges concurring) said, if a man be a Roman catholic, notwithstanding his religion he is a good witness. But he is not to answer this question; it may subject him to several penalties, at least, he is liable to prosecution upon several acts of parliament that are very penal, and no man is bound to answer any question that tends to make him accuse himself, or subject him to any penalties, or to infamy. If a witness be asked whether he were a deer-stealer, or whether he were a vagabond, or any other thing that will subject him to punishment, either by statute or by common law, whether he be guilty of petit larceny or the like, the law does not oblige him to answer such questions. And to the present purpose: to ask a man whether he be a popish recusant is to subject him to danger: for when you ask him whether he were bred up in that religion, then, for him to own himself of that religion now, is to own as great a crime as the prisoner stood charged with. If it were not so, but if he was always bred in that religion, yet there are very great penalties that he is subject to, as the confiscation of two third parts of his estate, and several other things. We must keep the law steady and even between the prisoner and the witness; and if the witness does not answer it voluntarily of himself, it cannot be imposed upon him, for he is not obliged to answer it. 4 St. Tr. 605, 606.

And in ANNESLEY, v. the earl of ANGLESEY, *Excheq. Irel. Mich. 27 Geo. 2.* 1743. When John Ryan was cross-examined, the counsel for the defendant asked him,

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"What

"What religion are you of?" he answered, "I am a Roman catholic;" then they asked him, "Do you follow any business, or are you of any profession?" (he was a Roman catholic priest) the court said, "You need not answer that question, if you think it will criminate yourself," and he refused answering it. 4 *St. Tr.* 414. *in notes.*

Rule the Second.

But where a witness has been convicted of an infamous crime, and has suffered the execution of the judgment, he may be questioned as to that fact. *Ante*.

As in the *KING, v. EDWARDS, Mich. 32 Geo. 3. Ban. Reg.* On an application to bail the prisoner, who was charged with grand larceny, one of the bail was asked, whether he had not stood in the pillory for perjury? This question was objected to, as tending to criminate himself. But,

The court over-ruled the objection; saying there was no impropriety in the question; as the answer could not subject him to any punishment; and the bail admitting the fact, was rejected. 4 *Term. Rep.* 440.

Rule the Third.

Neither can a witness be compelled to answer any question to shew his own turpitude or infamy. 4 *Inst.* 479. 2 *Sess. Ca.* 171. *Ante* 257.

Rule the Fourth.

But though a witness is not to be asked whether he ever committed any particular offence, yet he may be asked, whether he ever was *tried* for, or charged with a particular offence, and is bound to answer the question.

As in the *KING, v. the reverend WILLIAM JACKSON, East. 35 Geo. 3. B. R. Ireland, at bar*, for High-Treason.

Curran, one of the prisoner's counsel, was permitted, without objection, to ask *Cockayne*, an attorney, and a witness for the crown, on the cross-examination;

"Whether

“ Whether he had ever obtained a pardon, and for
 “ what ? whether he had ever been tried for perjury ?
 “ whether he had ever been pardoned for perjury ? per-
 “ jury in what ? and whether he had ever told any per-
 “ son that the affidavit on which the perjury was assigned
 “ was false ?” *Ridgeway's Rep. Jackson's Tr.* 50.

And in the KING, v. DUNN, and CARTY, *Dublin, comm. Oyer and Term. Decemb. 38 Geo. 3. 1799.* Indicted for a conspiracy to murder lord Carhampton.

Curran, one of the prisoner's counsel, on cross-examination, asked *James Ferris*, a witness for the crown,
 “ Whether, he being an attorney, had ever been cen-
 “ sured by any of the courts ? whether the charge was
 “ for embezzling his client's money ? whether he ever
 “ issued a writ in another attorney's name ? whether he
 “ was not charged with threatening a prosecution for a
 “ rape ? whether he had not sworn he knew nothing of
 “ issuing a writ, which he had issued, &c.” *Ridgeway's Rep. of the Trial,* 27.

So in the case of the KING, v. JAMES WELDON, tried for High Treason, at *Commissions of Oyer and Terminer*, for the county and city of *Dublin, December 1795, and February 1796.*

William Lawler, a witness, who admitted having been an accomplice in the treason he was called to prove against the prisoner, was asked by *Curran*, one of the prisoner's counsel, on his cross-examination : “ What religion are you of ?” and having answered, “ a protestant,” he was then asked, “ have you always professed the protestant religion ? do you think you know the principles and grounds of that religion ? were you taught to believe there was a God ? were you taught that there was the suffering of his son, for the redemption of mankind ? do you understand that your belief of those sacred doctrines is the foundation of the oath you have taken ? have you never upon any occasion declared, that you did not believe there was a God ?” here the witness hesitated.

The attorney-general, (*Wolfe*) objected to the question, and said, it ought not to be answered, if it exposed the witness to punishment.

CHAPTER XXIII.

On the certainty of Evidence; when it may be given on the KNOWLEDGE of the Witness; and when it may be received on his BELIEF.

Rule.

A WITNESS, when under examination in chief, must not depose as he *thinks*, or *persuades* himself to believe: he must swear from his *knowledge* of the fact. But his belief is evidence on the cross examination, whether he appears on the part of the crown or of the prisoner.

So in ADAMS, v. CANON, *Star-chamber, Mich. 19 Jac. 1.* An action was brought for maintenance in divers suits; and alledged particularly, that the defendant disbursed money for one *Powell*, in an action which *Thomas Wood* brought against him in chancery, and to prove this two witnesses were produced. One deposed that he knew it to be true; and being examined why he would swear that; answered, because his father had said so. In this case much was said about the deposition of witnesses. *First*, that if one witness depose of his own knowledge, of the very point in question, and the other in the circumstances, that shall be sufficient ground for the judge to pass sentence; and this was said by MONTAGUE, C. J. then president of the council. *Secondly*, that it is not satisfactory for the witness to say, that he *thinks*, or *persuadeth himself*, that is *believes*, and that for three reasons laid down by lord Coke. 1. Because the judge is to give an absolute sentence, and therefore ought to have more sure ground than thinking. 2. The witness cannot be prosecuted for perjury; that judges, in their judicial situation, are always to give judgment *secundum allegata et probata*; notwithstanding private individuals think otherwise. And so Canon was discharged. *Dyer 53, in note, to ROLFE, widow, v. HAMPDEN, knight.*

NOTE.

NOTE. As to the second reason, though lord *Coke* hath laid it down as law, and *Hawkins* has adopted it, it has been over-ruled.

HAWKINS saith, that "No oath shall amount to perjury, unless it be sworn absolutely and directly; and therefore he who swears a thing according as he *thinks*, *remembers*, or *believes*, cannot, in respect of such an oath, be found guilty of perjury." 3 *Inst.* 166. 1 *Hawk. P. C. ca.* 69.

But lord chief justice DE GREY, in considering this question, declared it was a mistake mankind had fallen into, that a witness cannot be convicted of perjury, who swears that he *thinks* or *believes* a fact to be true, for that he certainly may, and the caution of the swearing only renders the proof of it more difficult. *Millar's ca.* 3 *Wilson* 427. 2 *Blackf. Rep.* 881.

And earl MANSFIELD confirmed this opinion in *Pedby's* case. It is, said his lordship, certainly true, that a man may be indicted for perjury, in swearing that he *believes* a fact to be true, which he knows to be false. *Leach's Cr. Ca.* 270.

And if this was not the case, witnesses swearing falsely on their *belief*, when under cross-examination, would escape with impunity.

To these rules there is an exception, in the case of professional men giving evidence; they are always examined to the best of their skill and knowledge. *Vide post*

CHAPTER XXIV.

On the right of a Witness to refresh his memory, when giving evidence from written memorandums.

Rule the First.

A WITNESS shall not be permitted to read his evidence from any written, or printed paper.

But

But it appears, in the course of the state trials, that it hath always been customary for the courts to allow witnesses to look upon their written notes, to refresh the memory.

As in the dutchess of KINGSTON's case, before the LORDS, 16 Geo. 3. a witness, named *Laroche*, was permitted to refer to written memorandums, copied from minutes in his own hand writing; but which memorandums had been copied by his own desire, and had continued in his possession since they were so copied. 11 St. Tr. 255.

And in the KING, v. JAMES DUNN, and PATRICK CARTY. *Commission of Oyer and Terminer*, city of Dublin, October, 1797. Indicted for conspiring to murder the earl of Carhampton. *James Ferris*, an approver, enquired of the court, if he was at liberty to recur to notes to assist his memory.

Mac Nally, for the prisoner, examined the witness as to the manner of his preparing these notes: and the witness admitted, that he had originally taken notes two or three days after his meeting with the prisoners. That he took them at different times; but always immediately after each particular transaction. That he had revised, embellished, diminished, and increased them, occasionally, at subsequent periods.

The counsel, on this examination, submitted to the court, that as notes regularly taken, could only be resorted to by a witness, for the special purpose of refreshing his memory, as to facts immediately taken down by him, the witness should not be permitted to recur to these notes after confessing that they had been revised, embellished, diminished, and increased, which shewed that they were not original minutes, and that they were prepared and dressed up, probably, not for merely refreshing the memory of the witness, but for a much more serious purpose, fabricating evidence to support the charge in the indictment. He cited *Doe*, on the demise of *Philips*, v. *Pickering*. 3 Term. Rep. 749. *Post*.

The COURT gave no decided opinion upon the point; but *BOYD*, J. who sat with *DOWNES*, J. desired the witness to state what he could from his recollection; and that

that he might recur to the notes afterwards if necessary.
Ridgeway's Rep. Dunn's trial, 10. M. S. note of the same trial.

Rule the Second.

A witness may refresh his memory by any book or paper, if he can afterwards swear to the fact, from his own recollection; but if he cannot swear to the fact from recollection, any further than as finding it entered in a book or paper, the original book or paper must be produced.

As in *DOE, on the demise of CHURCH, v. PERKINS, Trinity, 30 Geo. 3. B. R. Ejectment.*

This came on upon motion for a new trial, and one of the objections was to evidence received on the trial by lord LOUGHBOROUGH, C. J. C. P.

One *Aldridge* had been permitted to give evidence concerning the dates of several tenancies, from *extracts* made by himself out of an original book; confessing upon his cross-examination, that he had no memory of his own of those specific facts, but that the evidence he was giving as to those facts, was founded altogether upon the extracts which he had made from the abovementioned book.

Erskine, Partridge, Bower, Adair, and Wilson, against granting a new trial, said.—Although neither the original book itself, any more than the extracts, could be produced as evidence in themselves, yet the witness who heard the declaration of the tenants, and either wrote the entries with his own hand, or saw them written by the receiver, might be permitted to refresh his own memory by referring to either. The objection only holds where the instrument or paper referred to is brought forward as evidence in itself of a fact. And therefore if it had been attempted to give in these extracts to the officer of the court, to be read in evidence in the cause, there would be ground for the argument. But the evidence of the fact here was given on the oath of *Aldridge*: and they cited the *dutcheis of Kingston's case. Ante.*

LORD KENYON, C. J. read a note from a MS. of the late lord *Abbington*: from which it appeared, that in Michaelmas vacation, 1753, before the lord CHANCELLOR, Mr. Noel moved to suppress depositions, on a certificate from the commissioners, before whom they had been taken, that the witness, whose depositions they were, refreshed her memory during her examination, by minutes consisting of six sheets of paper, of her own hand-writing, the substance of which she declared to them she had set down, from time to time, as the facts occurred to her memory; that five of the sheets were drawn up in the form of a deposition, which she told them was done by the plaintiff's solicitor, whom she had requested to digest her notes, and reduce them to some order; and after he had done so, she transcribed and altered them wherever it was necessary, to make them consistent with her meaning. The certificate added, that she declared the six sheets to have been entirely drawn by herself, unassisted by any person whomsoever: that as they apprehended they had no right to take the minutes from her, she had frequent recourse to them during her examination: and this certificate was signed by all the commissioners.

Mr. Noel insisted, that this practice was too dangerous to have the countenance of the court; and that there was a sufficient foundation for this application to suppress the depositions.

The *attorney* and *solicitor-general* opposed the motion. They insisted, that nothing was more frequent than to allow witnesses in a court of law the use of minutes to refresh their memory. That the only circumstance which seemed to distinguish this case from that, and to give a colour to the present application, was the witnesses employing the plaintiff's attorney to digest her *memoranda*; but there could not be much weight in that circumstance, when it was considered that it was not pretended that there had been any tampering with the witness, and that she had carefully altered these papers wherever her attorney had mistaken her meaning; that she swore positively to the truth of every part of them; and though it might be improper to write the whole of a deposition before

before examination, yet where a person was to be examined to a great number of dates, &c. it was very necessary to have some helps of this kind.

LORD CHANCELLOR. Whether there has been any tampering or no I know not, but I know there has been a great mistake, both by the parties and the commissioners, who, however, did right after their mistake, to lay it before the court. Should the court connive at such proceedings as these, depositions would really be no better than affidavits; for should a witness be permitted to use a paper, especially one drawn up by the attorney of one of the parties, though from *memoranda* furnished by the witness, I might as well let the attorney draw an affidavit for her and use that instead of a deposition. She insists, indeed, that she altered and amended it; but every body knows that slight alterations in a phrase makes it convey very different ideas. To be sure, in some cases, a man may use papers at law, but I have known some judges, and have adhered chiefly to that rule myself, use only papers drawn up as the fact happened, and all other papers I have bade them put in their pockets; and if they had been offered which were drawn by the attorney, I should have reprimanded him severely. As to dates and names, which are merely technical, it is quite another thing. The commissioners should have rejected these depositions, but as they have fairly represented the fact, and the whole of the motion is to suppress the depositions for the precedents sake, they shall be suppressed. And as publication is not passed you may examine the witness.

BULLER, J. read another *M. S. TANNER, v. TAYLOR, Hereford, Spring assizes, 1756*. In an action for goods sold and delivered; the witness who proved the delivery, took it from an account which he had in his hand, being a copy, as he said, of the day-book, which he had left at home, and it was objected that the original ought to have been produced.

LEGGE, B. said, that if he would swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it: but if he could not from recollection swear to the deliveries any
MM 2 further,

further, than as finding them entered in his book, then the original should have been produced: and the witness saying he could not swear from recollection, the plaintiff was non-suited.

Lord KENYON said, that the rule appeared to have been clearly settled, and that every day's practice agreed with it. And that comparing this case with the general rule, the COURT were clearly of opinion, that *Aldridge*, the witness, ought not to have been permitted to speak to facts, from the extracts which had been made use of at the trial. *Rule absolute for a new trial.* 3 Term. Rep. 749.

CHAPTER XXV.

Of the Confession of the Defendant upon an indictment for High Treason.

[VIDE *Ante*, Ca. 6. p. 37.]

Rule the First.

FROM the various decisions since the enacting of the 7 of Will. 3. results this rule of law, that with regard to all collateral facts, not conducing to the proof of the overt-act, that whatever was evidence at common law is still good evidence under the statute, the provision of the statute being confined to the proof of the overt-act. *Fof.* 242.

Therefore evidence of a confession of high treason, by two witnesses, upon an examination before a justice of peace, was ruled to be sufficient to convict the person so confessing, within the meaning of the 1 *Edw.* 6. ca. 12. and 5 & 6 *Edw.* 6. ca. 11. which required two witnesses in high treason, "unless the offender should willingly, without violence, confess the same." 2 *Hawk.* P. C. ca. 46. ca. 25.

And this was determined by all the judges, in the *KING, v. THONG*, *Newgate sessions*, December, 14 Car. 2. that if a conspirator be examined before a privy counsellor,

fellor, or a justice of the peace, and upon his examination, without torture, he confesses the treason; if after, at his trial he deny it, two witnesses to prove that confession, are good evidence against him that made the confession at his examination afore said; and in that case there needs no witness to prove him guilty of the treason, for that confession puts it out of the statute which requires two witnesses to prove the treason, unless the party shall without torture confess the same, and the confession there spoken of, is not meant a confession before the judges at his trial, but a confession upon his examination: but such confession, so proved, is only evidence against the party himself who made the confession, but cannot be made use of as evidence against any others, whom on his examination he confessed to be in the treason. *Kelyng* 18,

Rule the Second.

But the above rule is remedied by statute, which requires two witnesses, "unless the party shall willingly, without violence, in open court, confess, &c." *7 Will. 3. ca. 3.*

Foster observes strongly on a difference in the wording the statute of *Will. 3.* and the statutes of *Edw. 6.* which merits consideration, so far as warrants a different construction on them. *Fos. 240.*

The words of the statute of *Will. 3.* are, "unless the party shall willingly, without violence, in open court confess the same." The words in *open court*, the statutes of *Edw. 6.* have omitted. These words seem to have been inserted, in order to carry the necessity of two witnesses to the overt-acts, farther than the statutes of *Edw. 6.* were formerly thought to carry it. Vide the preceding opinion from *Kelyng* 18. 1 *Hale P. C.* 304. and *Tongé's case, Ante* 268. 2 *Andersf.* 67.

For the construction of these statutes hath been, that a confession upon an examination of the party taken out of court, before the privy council, a magistrate, or person having authority to take such examination, proved upon the trial by two witnesses, is evidence of itself sufficient to convict,

convict, without further proof of the overt-acts; for, say the books, such confession *putteth the case out of the statute, it satisfieth the statute*; and by confession is not meant a confession before a judge upon the prisoner's arraignment, but upon his examination before a magistrate; for saith *Coke*, the words without violence, mean willingly, *without any torture*, and the judge is never present at any torture, neither upon the prisoner's arraignment was any torture ever offered. 3 *Inst.* 25. 2 *Hale P. C.* 304. *Fof.* 241.

But at a conference among the judges, preparatory to the trial of *Francis Francia*, at which the attorney and solicitor-general, who were to conduct the prosecution, assisted, no regard seemeth to have been paid to the antecedent authorities; for it was then agreed, that upon the foot of those acts of *Edw. 6.* by confession is meant only a confession upon the arraignment of the party, which it was said amounteth to a conviction. *Ibid.*

In the *KING, v. FRANCIS WILLIS*, *Old-Bailey*, 9 *Ann.* 1710. the counsel for the crown called a witness to prove what the prisoner had said to him, touching the share he had in the treason he then stood charged with. The prisoner's counsel objected to this sort of evidence, and insisted, that by this act no confession, except it be made in open court, shall be admitted in evidence. But the judges present were very clear, that such confession is evidence *admissible*, proper to be left to a jury, and will go in corroboration of other evidence to the overt-acts, though it might be still a disputable point, whether a confession out of court, proved by two witnesses, is of itself sufficient to convict. 8 *St. Tr.* 254, 255, 262, 263.

Upon this last point, none of the judges, except *WARD, C. B.* gave a direct opinion; his words are, "a confession shall not supply the want of a witness, there shall be two witnesses to the treason notwithstanding, but to say it shall not be given in evidence there is no ground for it." *Fof.* 242.

In the same case, sir *JAMES MONTAGUE*, attorney-general, admitted that two witnesses are necessary besides the confession.

Sir

Sir ROBERT EYRE, the solicitor-general is more explicit, and saith he, "the prisoner shall not be convicted on a trial without two lawful witnesses, that is the thing provided for. It was to exclude a precedent that had been settled in *Tonge's* case, but it was not designed to exclude all confessions. That was evidence at law, and always must be so. The design of the act was, to exclude confessions from having the force of a conviction, unless it were in a court of record; and to prevent a confession proved by two witnesses from being a sufficient ground for conviction."

In the argument in the case of *Willis*, the cases of *Vaughan*, before cited, and of one *Smith*, alias *Mery*, were cited. The case of *Smith* was at an admiralty sessions in *June 7 Ann*, on an indictment for adhering to the queen's enemies on the high seas. He made alienage his defence as *Vaughan* did, and his confession that he was an Englishman born, was holden to be admissible evidence, though his counsel insisted on this act of the 7th Will. 3. *Fost.* 242.

The court in the same case said, that the 7th Will. 3. was to prevent a confession being *conclusive* evidence of the very overt-act, not to take away that sort of evidence of collateral matters: and *Vaughan's* case was relied on. *Ib.*

Upon the trial of JOHN BERWICK, *special commission at St. Margrett's-hill, Southwark, July 17, 1746, 19 Geo. 2.* There was only one witness that proved the prisoner to have been in arms with the rebels. This witness proved that he was enrolled and reviewed as a lieutenant in the rebel regiment called the Manchester regiment, and did duty as such at *Penrith* and *Carlisle*.

Two other witnesses, officers in the duke of CUMBERLAND's army, swore that after the surrendering of *Carlisle*, they were ordered by the duke to take an account of the names of the officers, and of their respective ranks in the rebel garrison; that accordingly they went to the prison where the officers were confined apart from the common men, and took such account of them. That the prisoner *Berwick* appeared among the officers, and gave in his name to them as lieutenant in the Manchester regiment.

The

The counsel for the prisoner insisted that the charge was not proved, for that in all cases of high treason there must be two positive witnesses to prove the facts of treason.

FOSTER, J. doubted whether this declaration, being made after the surrender of Carlisle, can be considered in any other light than as a confession after the fact. And with regard to a confession after the fact, said, he never doubted whether it might be given in evidence as a corroborating proof. His doubt was, whether it being proved by two witnesses is a conclusive evidence, not an evidence sufficient of itself to convict without other proof, since the 7 Will. 3. requires two witnesses to overt-acts, or a confession in open court.

WILLES, C. J. and ABNEY, J. were of opinion, that this declaration of the prisoner is not to be considered as a bare confession after the fact, but as an evidence of the fact itself, viz. that the prisoner did appear and take the rank of a lieutenant in the rebel garrison.

They also thought, that a confession after the fact, proved by two witnesses, was sufficient to convict under the stat. of Will. 3. 9 St. Tr. 559.

FOSTER, taking a retrospect of the case of *Francia*, above cited, and of his own opinion says, he had not heard of the opinion in *Francia's* case before the trial of *Berwick*, though he believes some of the judges had seen it, it was cited and much urged by the counsel for the crown; and a manuscript note of it was produced; and he adds in a note, evidence of confession was held sufficient by the judges who sat upon the commissions in the North in the same summer, upon the authority of the opinion in the *King, v. Berwick*. *Fof.* 241.

Notwithstanding the difference of opinion which appears between *Foster*, and the other judges in *Berwick's* case, he does not arraign the proceedings, but says, that the facts proved with his declaration all by two witnesses, were properly considered by two learned judges, not as a bare confession after the fact, but as an evidence upon the spot, and in the very scene of action. *Fof.* 244.

And

And with regard to the proceedings in the North, already mentioned, he says, "I doubt not the learned judges went upon good grounds; the circumstances of each case, which I am not apprized of, being duly considered."

But a careful perusal of *Foster*, induces a belief, that there was more compliment than sincerity in the last observation. The authority of the opinion in 1716, by no means meets his approbation, though he says, "it is perhaps now too late to controvert it, warranted as it hath been by late precedents," an observation to which common sense cannot accede. No prescription, no precedent, no length of time, nor no number of determinations can sanction error or injustice; on the contrary, the repetition of a bad precedent converts the judgment of the court into oppression, and it is astonishing that *Foster* should even countenance a proceeding that does not fully meet his approbation.

Yet, instead of condemning the measure, he says, all that I insist on is, that the rule should never be carried further than that case warranteth; never further than to a confession made, during the solemnity of an examination before a magistrate, or person having authority to take it, when the party may be presumed to be properly upon his guard and apprized of the danger he standeth in, which was an ingredient in the case of *Francis* and of *Gregg*, cited in the argument of *Francis's* case. And all those already cited, which came in judgment before the statute of king *William*. *Fof.* 243.

For, continues the same author, hasty confessions made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often misreported, whether through ignorance, inattention, or malice, it mattereth not to the defendant, he is equally affected in either case; and they are extremely liable to misconstruction. And withal, this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is confronted. *Fof.* 243.

On the whole it may be concluded, that in *England* the *stat. of 7 Will. 3. ca. 3.* (which was never enacted in *Ireland*) prevents *such* confession, as above-mentioned, from having the force of a *conviction*; but does not destroy the admissibility of it in evidence *for any purpose*, except to prove the overt-acts laid in the indictment. The overt-acts must still be proved by *two lawful witnesses*, notwithstanding the admission of any such confession as to collateral matters; for no confession, except made *in open court*, which in *Francis's* case was determined to mean the arrangement of the party, can be sufficient ground for a conviction for treason.

NOTE. In *IRELAND*, attempts have been made by the Irish commons to obtain an act of parliament similar to the English *stat. 7 Will. 3.* but they always failed. In the present reign, a part of the English act was granted, by which a person indicted for high treason under the *25 Edw. 3.* shall have a copy of the whole indictment delivered to him, on request, five days at least before trial: and he shall be admitted to defend himself by counsel; and the court before whom he is to be tried, or any judge thereof, shall immediately, on his request, assign him such and so many counsel, not exceeding two, as he shall desire, to plead for him and assist him in making his defence. *Irish stat. 5 Geo. 3. ca. 21. sect. 1. 2. 9 Stat. at large, 388.*

But in *Ireland* one witness is sufficient to convict, even though that witness should be an accomplice: evidence of the prisoner's confession supports the overt-act, as well as collateral facts: the prisoner is neither intitled, as in *England*, to a copy of the panel from which the jury is to be sworn, nor to a list of the witnesses to be produced against him; and by statute, his peremptory challenges to the jurors are reduced from thirty-five, which are allowed in *England*, and which was his right at common law, to twenty. *Irish stat. 10 and 11 Car. 1. 2 Statutes at large 157. Vide ca. 5. Ante p. 15.*

NOTE. This chapter, according to the original arrangement, should have immediately succeeded chapter the sixth, which treats of confession at common law
and

and confession by *stat.* 2 and 3 *Phil. & Mar. ca. 10.*
Irish, 10 Car. 1. ca. 18. Ante 37.

CHAPTER XXVI.

*Of Evidence by Confession or by Accusation, obtained by
 the infliction of Torture.*

Rule the First.

BY the common law of England, and that law is by adoption, confirmed by statutes, the common law of Ireland, no such engine of power as the rack, or any other instrument of torture, can be used to furnish the crown with evidence, extorted out of the prisoner's mouth against himself or any other person. *Fortesq. de Laud. ca. 22. 3 Inst. 31. Fof. 244.*

EMLYN, in his preface to the *State Trials*, notices the excellencies of the English laws above all others, chiefly to consist in that part of them which regards *criminal prosecutions*; and among other particulars enumerated by him, says, "in other countries *racks* and *instruments of torture* are applied, to force from the prisoner a confession, sometimes of more than is true; but this is a practice which *Englishmen* are happily unacquainted with, enjoying the benefit of that just and reasonable maxim—*Nemo tenetur accusare seipsum.* *Emlyn Pref. St. Tr. fo. 3.*

FORTESCUE, C. J. and afterwards chancellor, in his lectures on the laws of England, written for the instruction of prince EDWARD, son to HENRY VI. after reprobating the tortures allowed by the *civil law*, makes this observation; what certainty can arise from confessions of men miserably tormented! But if some innocent person, having his mind fixed upon eternal salvation, would in such a *Babylonical furnace*, like the three children, bless and magnify the LORD, and not lie, to the damnation of his own soul, and the judge should thereupon pronounce him *not guilty*, doth not that judge,

by the self same judgment, judge himself *guilty* of all the cruelty and pains wherewith he hath tormented the innocent? O! how cruel is such a law, which, in that it cannot condemn the innocent, condemneth the judge? Sure such a *custom* is not to be accounted a *law*, but rather the highway to the devil! *Fortes. de Laudib. ca. 22. p. 49. London 1660.*

HARGRAVE in his notes upon *Emlyn's* preface, says, so absurd and unreasonable a practice was this, that even the ancients, among whom it was in use, had no good opinion of it, though it was certainly a practice of the ancient civil law, but is reprobated by *Grotius*, who approves of the omission of it in England. *Ibid. Dig. 49. l. 18. Grotius Lett. 693.*

Yet it is clear, from the wording of the statutes respecting confessions, in cases of treason, "unless the party shall willingly, and WITHOUT VIOLENCE confess the same," that torture was practised in England; and the fact is corroborated by king JAMES the first, who in a book called, "King JAMES's Premonition to all christian princes and states," says, "it was never used but in cases of high treason." *Edit. 1609. p. 30. Vide ca. 6. Ante 15. ca. 6. Ante 37.*

FOSTER considers this passage as accounting extremely well for the inserting of the words "*without violence*," in the statute of *Edw. 6.* but cannot, he says, so easily account for them in that of king *Will. 3.* *Fos. 244.*

The State Trials affords another proof that the rack has been used in England to extort confessions. On the trials of the earls of ESSEX and SOUTHAMPTON, 43 *Eliz. Anno 1600*, for high treason, sir *Edward Coke*, then attorney-general, in opening the case against the prisoners, says, "I cannot speak without reverend commendations of her majesty's most honourable justice, yet I think her over-much clemency to some, turneth to over-much cruelty to herself; for though the rebellious attempts were so exceedingly heinous, yet, out of her princely mercy, no man was *racked, tortured, or pressed* to speak any thing further than of their own accord and willing minds." And this discovery *without torture*, he calls the *goodness of GOD* towards the queen, and his

his just judgment upon the prisoners! A strain of adulation, observes *Foster*, to say no worse of it, nauseous and sordid, highly unbecoming a gentleman of the profession, especially one that well knew, and hath informed his readers, that any kind of torture in that case would have been utterly illegal. 1 *St. Tr.* 199. *Fof.* 244.

The passage in lord COKE, alluded to by FOSTER, is in the third Institutes. Writing on imprisonment, *Coke* says, it appeareth that where the law requireth a person to be kept in *salva et arota custodia*, yet that must be without pain or torment to the prisoner, and upon this two questions arise, when, and by whom, the rack or brake in the tower of London was brought in. 3 *Inst.* 35.

To the first—*John Holland*, earl of Huntingdon, was, by king *Henry* the sixth, created duke of *Exeter*, and in the twenty-sixth year of *Henry* the sixth, the king granted to him the office of the constableship of the Tower. He, and *William de la Poole*, duke of *Suffolk*, and others, intended to have brought in the civil laws; for a beginning whereof, the duke of *Exeter*, being constable of the Tower, first brought into the Tower the rack or brake, allowed in many cases by the civil law. And thereupon the rack is called the duke of *Exeter's* daughter. 3 *Inst.* 35.

To the second, upon this occasion sir JOHN FORTESCUE, chief justice of England, who wrote his book in commendation of the laws of *England*, and therein preferreth the same for the government of this country before the civil law, says particularly that all tortures and torments of parties accused, were directly against the common laws of *England*, and sheweth the inconvenience thereof by fearful example. So as there is no law to warrant tortures in this land, nor can they be justified by any prescription, being so lately brought in. 3 *Inst.* 35. *Ante* 275.

Coke then quotes *Virgil*, describing the iniquity of *Radamanthus*, that cruel judge of *Hell*—*Castigatque, auditque dolor, subigitque fateri.*

First, he punished before he heard; and, when he had heard his denial, he compelled the party accused to confess it. But far otherwise doth almighty God proceed, *post qua reus diffamatus est. Nunquid lex nostra judicat,*
nisi

nisi prius audierit ab ipso. ST. LUKE, *ca.* 16. v. 1. JOHN, *ca.* 7. v. 51.

TORTURE is also against MAGNA CHARTA. *Nullus liber homo, &c. aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parvum suorum, aut per legem terræ.* *Ca.* 29.

All the ancient authors are against any pain or torment to be put or inflicted upon the prisoner, before attainder, or after attainder, but according to the judgment. And there is no one opinion in our books or judicial record, for the maintenance of torture or torments. 3 *Inst.* 35.

Norwithstanding these authorities, when *Felton*, upon his examination at the council board, declared as he had always done, that no man living had instigated him to the murder of the duke of *Buckingham*, or knew of his intention, *Laud*, bishop of London, said to him, "If you will not confess you must go to the rack;" the man replied, "If it must be so, I know not who I may accuse in the extremity of my torture—bishop *Laud*, perhaps, or any lord at this board." Sound sense in the mouth of an enthusiast and ruffian!

Laud having proposed the rack, the matter was shortly debated at the board, and it ended in a reference to the judges, who, to the honour of the law, and of themselves, unanimously resolved, that the rack cannot be legally used. *Fof.* 244. *Blackf. Comm.* 321.

MONTAIGNE has considered this subject. He argues, that the putting men to the rack is a dangerous invention, and is rather a trial of patience than a criterion of truth. *Montaigne* says, both he who *has*, and he who has *not* the fortitude to endure pain, conceals the truth: for why should torture sooner make me confess what really is true, than force me to assert what is false. On the contrary, if he who is not guilty of the crime charged against him, has courage to suffer torments, why should not he who is guilty, possess equal courage, when life is the reward? The ground of this invention proceeds from the consideration of the force of conscience: for conscience, to the guilty man, seems to assist the rack in forcing him to confess his crime, and to shake

shake his resolution, but on the other side, conscience fortifies the innocent against torture. It is in truth a trial of uncertainty and of danger. What would not a man say—what would not a man do, to avoid intolerable torments? To this question, by *Montaigne*, *Felton* gave the right answer, he would accuse the innocent.

Etiam innocentes cogit mentiri dolor.

Pain, the most innocent will make to lie.

The man, whom the judge puts to the rack, that he may not die innocent, if *not* guilty, dies both *innocent* and *racked*. Thousands have accused themselves falsely.

The marquis BECCARIA, of Milan, has treated confession by torture, in a most masterly manner. He considers this infamous test of truth, a remaining monument of that ancient and savage legislation, in which trials by fire, by boiling water, or the uncertainty of combats, were called *judgments of GOD*; as if the links of the eternal chain, whose beginning is in the breast of the first cause of all things, could ever be disunited by the institutions of men. *Ca. 16.*

The only difference between torture, and trials by fire and boiling water, is, says *Beccaria*, that the event of the first depends on the will of the accused; and of the second on a fact entirely physical and external, but this difference is apparent only, not real. A man on the rack, in the convulsions of torture, has as little in his power to declare the truth, as in the former to prevent, without fraud, the effects of fire or of boiling water. *Ibid.*

Every act of the will, is invariably in proportion to the force of the impression on our senses. The impression of pain then may increase to such a degree, that, occupying the mind entirely, it will compel the sufferer to use the shortest method of freeing himself from torment. His answer, therefore, will be an effect, as necessary as that of fire or boiling water; and he will accuse himself of crimes of which he is innocent. So that the very means employed to distinguish the innocent from the guilty, will most effectually destroy all difference between them. *Ibid.*

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The result of *torture* then, is a matter of calculation, and depends on the constitution, which differs in every man, and is in proportion to his strength and sensibility, so that to discover truth by this method is a problem which may be better solved by a mathematician than a judge, and may be thus stated. *The force of the muscles, and the sensibility of the nerves of an innocent person being given, it is required to find the degree of pain necessary to make him confess himself guilty of a given crime. Ibid.*

The examination of the accused is intended to find out the truth, but if this be discovered with so much difficulty in the air, gesture, and countenance, of a man at ease, how can it appear in a countenance distorted by the convulsions of torture? every violent action destroys those small alterations in the features, which sometimes disclose the sentiments of the heart. *Ibid.*

Some civilians, and some nations, permit the *petitio principii* to be only three times repeated, and others leave it to the discretion of the judge: therefore, of two men equally innocent or equally guilty, the most robust and resolute will be acquitted, and the weakest and most pusillanimous will be condemned, in consequence of the following excellent method of reasoning. "I, the judge, must find some one guilty. Thou who art a strong fellow hast been able to resist the force of torment; therefore I acquit thee. Thou being weaker has yielded to it, I therefore condemn thee. I am sensible that the confession which was extorted from thee has no weight; but if thou dost not confirm by oath, (which was always required) I will have thee tormented again." *Becc. ca. 16. 51.*

A very strange but necessary consequence of the use of *torture* is, that the case of the innocent is worse than that of the guilty. With regard to the first, either he confesses the crime which he has not committed and is condemned; or he is acquitted, and has suffered a punishment he did not deserve. On the contrary, the person who is really guilty, has the most favourable side of the question, for if he support the torture with firmness and resolution, he is acquitted, and has gained having changed a greater punishment for a less. *Ibid.*

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The law by which torture is authorized says, *Men be insensible to pain—Nature has indeed given you an irresistible self-love, and an unalienable right of self-preservation; but I treat in you a contrary sentiment, an heroic hatred of yourselves. I command you to accuse yourselves, and to declare the truth, midst the tearing of your flesh, and the dislocation of your bones.* Ibid.

Torture is used to discover whether the criminal be guilty of other crimes besides those of which he is accused, which is equivalent to the following reasoning—*Thou art guilty of one crime, therefore it is possible that thou mayst have committed a thousand others; but the affair being doubtful, I must try it by my criterion of truth. The laws order thee to be tormented, because thou mayst be guilty, and because I chuse thou shouldst be guilty.* Ibid.

Torture is used to make the prisoner discover his accomplices; but if it has been demonstrated that it is not a proper means to discover truth, how can it serve to discover the accomplices, which is one of the truths required? will not the man who accuses himself yet more readily accuse others? besides, is it just to torment one man for the crime of another? may not the accomplices be found out by the examination of the witnesses, or of the criminal; from the evidence, or from the nature of the crime itself; in short, by all the means that have been used to prove the guilt of the prisoner. Accomplices generally fly when their comrade is taken. The uncertainty of their fate condemns them to perpetual exile, and frees society from the danger of further injury, whilst the punishment of the criminal, by deterring others, answers the purpose for which it was ordained. *Beccar. ca. 16. p. 51, 52, 53.*

BLACKSTONE, with his usual precision and perspicuity, adopts the sentiments and arguments of the humane and elegant BECCARIA. The commentator on the common law of England, thus argues against the inhumanity and weakness of the civil code in procuring *confession* by the rack. It seems, he says, astonishing that this usage of administering the torture, should be said to arise from a *tenderness* to the lives of men: yet this is the reason given for its introduction in the civil law, and its subsequent
 o o adoption

adoption by the French and other nations, viz. because the laws cannot endure that any man should die, upon the evidence of a false or even a single witness; and therefore contrived this method, that innocence should manifest itself by a stout denial, or guilt by a plain confession! Thus rating a man's virtue by the hardness of his constitution, and his guilt by the sensibility of his nerves! But there needs only to state accurately, in order most effectually to expose this inhuman species of mercy; the uncertainty of which, as a test and criterion of truth, was long ago pointed out by TULLY; though he lived in a state wherein it was usual to torture slaves (but not freemen) in order to furnish evidence: *Tamen, says he, illa tormenta gubernat dolor, moderatur natura cujusque tum animi tum corporis, regit quesitor, flectit libido, corrumpit spes, infirmat metus; ut in tot rerum angustis nihil veritati loci relinquatur. Pro Sulla 28. Cod. l. 9. t. 41.—l. 8. t. 47.—l. 16. 4 Blasph. Comm. 321.*

CHAPTER XXVII.

In what cases the Examinations or the Declarations of Prisoners, and the information of Witnesses, taken out of Court, whether before the Coroner or Justice of the Peace, may be read in evidence against a Prisoner on his Trial, under the rules of the Common Law, or pursuant to Statutes.

[VIDE Ca. 6. Ante 37.]

NOTE. It has been already laid down, that at common law, in cases of life, no evidence is to be given against a prisoner but in his presence. 2 Hawk. P. C. ca. 46. Vide Chap. 4. Ante 14.

Rule the First.

IN cases of misdemeanors, an examination taken before a magistrate, *ex parte*, cannot, either at common law

law or by statute, be given in evidence on the trial of the defendant. Vide, *the last rule in this chapter. Post*.

As in the KING, v. PAINE, *Hill. 7 Will. 3.* it was determined by the court of king's bench, with the concurrence of the common pleas, that the deposition of witnesses, taken *ex parte* before a magistrate, on an examination concerning a misdemeanor, cannot be read in evidence on the trial of the party for such misdemeanor, after the death of the deponents, because as the defendants was not present before the magistrate when they were taken, he had no opportunity to cross examine them. *5 Mod. 165. 2 Salk. 417, 418. 3 Term. Rep. 723. Vide ca. 4. Ante 14.*

But in the KING, v. BUCKWORTH, *Mich. 20 Car. 2.* for perjury, before KELYNG, C. J. and TWISDEN, and MORTON, J's. A witness was produced to prove, what a person deceased had sworn at the former trial in ejectment; and this was allowed to be good evidence, because it doth not go to the proof of the charge itself that the defendant swore, but only to the *falsity* of the *fact* that was sworn. And it was held that the charge itself, which consists in the truth of the proof of the fact, and the certainty of what the defendant swore, might be directly proved in evidence, which might be cross-examined by the defendant; but that the falsity of the fact to which the defendant swore, may be made out by any other proof, because in this case you may give the verdict in evidence to prove the perjury; in as much as the cause in which the perjury was committed, must be set forth in the information or indictment, and of consequence be proved on the issue. And when you prove that the defendant swore in the cause, you may shew the whole matter, *viz.* how his evidence stood exposed by the party deceased. *Sir Thom. Raym. 170. Gilb. Evid. by Loft, 214.*

Rule the Second.

As in cases of life, no evidence is to be given against the prisoner except in his presence: of course, previous to the enacting (in *England*) of the statutes of *Philip* and

and *Mary*, (and in *Ireland*) the statute of 10 *Charles* 1. a deposition taken before a justice of the peace where the felony was committed, was not admissible evidence on the trial of the party, even though the witness died, or was unable to travel. *Ante* 14.

The statutes above referred to, enact—

First, “That *justices of the Peace*, when any person is brought before them for manslaughter, or felony, or suspicion of manslaughter or felony, being bailable by law, shall before any bailment or main prize, take the examination of the said prisoner, and the *information* of them that bring him, of the fact and circumstance thereof, and the same or as much as may be material thereof, to prove the felony, shall be put in writing before they make the same bailment, which same examination, together with the said bailment, the said justices shall certify, at the next general gaol delivery, to be holden within the limits of their commission.”

Stat. 1 and 2 Phil. & Mar. ca. 13. s. 4. Irish, 10 Car. 1. ca. 18. 2 Stat. at large, 75.

Secondly, It is also enacted, “That every coroner, upon any inquisition before him found, whereby any person or persons shall be indicted for murder or manslaughter, or as accessory or accessaries to the same, before the murder or manslaughter committed, shall put in writing the effect of the evidence given to the jury before him being material; and as well the said justices, as the said coroner, shall bind all such by recognizance as do declare any thing material, to prove the same, to appear at the next general gaol delivery, and shall certify as well the same evidence as the recognizance in writing.” 2 and 3 *Phil. & Mar. ca. 13. sect. 4. Irish, 10 Car. 1. ca. 18. 2 Stat. at large, 75.*

Thirdly, It is further enacted, “That the said justice, or justices, before he or they shall commit, or send such prisoner to ward, shall take the examination of the prisoner, and the *information* of those who bring him, and shall put the same in writing within two days after the said examination, and the same shall certify in such manner and form, and at such time as they should and ought to do, if such prisoner so com-
mitted

"mitted or sent to ward had been bailed, &c." *Stat. 2 and 3 Phil. & Mar. ca. 10.*

NOTE. These statutes, which were enacted in Ireland in 1634, give to the magistrate the same jurisdiction in charges of *treason*, as in *felony* or *manslaughter*; but when they were passed, *murder* was *treason* in Ireland, at present it is not.

From these acts of the legislature several rules have sprung, derogatory to the ancient common law: and these rules were settled by the judges, and received as law by the house of lords of England, *anno* 1606.

At that period, previous and preparatory to the trial of lord MORLEY, in the LORDS, for murder, 18 *Car. 2.* The JUDGES were called upon and delivered their opinions on certain points submitted to them, which opinions may now be considered as the basis of certain rules of evidence, applicable to the present subject. The JUDGES were, KELYNG, C. J. B. R. sir ORLANDO BRIDGMAN, C. J. C. P. sir MATTHEW HALE, C. B. and ATKYNS, TWISDEN, TYRRELL, TURNER, BROWN, WYNDHAM, ARCHER, RAINSFORD, and MORTON, justices. They resolved,

Rule the Third.

That in case any of the witnesses which were examined before the coroner, were *dead*, or *unable to travel*, and oath made thereof, that then the examination of such witness, so dead, or unable to travel, might be read, the coroner first making oath that such examinations are the same which he took upon oath, without any addition or alteration whatsoever. 7 *St. Tr.* 421. *Kelyng* 55. *S. C.* *Ante ca. 6. p. 37.*

Rule the Fourth.

That in case oath should be made that any witness, who had been examined by the coroner, and was then *absent*, was detained by the means or procurement of the prisoner, if the court be satisfied by the evidence they have heard, that the witness was detained by the means

or

or procurement of the prisoner, then the examination might be read, but whether he was detained by the means or procurement of the prisoner was matter of fact. *Ibid.*

Rule the Fifth.

That if a witness, who is examined by the coroner be *absent*, and oath is made that the prosecutors have used all their endeavours to find him, that is not sufficient to authorize the reading of such examination. *Ibid.*

These rules are cited, and fully adopted by HAWKINS, and other authorities. 2 *Hawk. P. C. ca.* 46. 2 *Hale P. Cr.* 284. *Sum.* 262, 263. *Kelyng* 55. 1 *Lev.* 180. 2 *Keb.* 19. *Dalt.* 111, 112, 113.

On the trial of lord MORLEY, the especial point on which the JUDGES had formerly resolved arose.

Mr. solicitor-general FINCH desired the depositions of some witnesses, taken before the coroner, who was since dead, to be read, which the prisoner opposed, desiring that no evidence might be given against him, but face to face.

The lord high steward (lord CLARENDON, chancellor) demanded the opinion of the JUDGES, who by KELYNG, C. J. answered, that upon proof made, that the witnesses were dead, and oath by the coroner that the depositions were unaltered, they ought to be read. Which was done. 7 *St. Tr.* 424.

Maynard, serjeant, desired that the depositions of a material witness, taken at the coroner's inquest, who had now absented himself, so that they could not find him, might be read.

Lord Morley, the prisoner opposed it, and the opinion of the JUDGES being required, the lord chief justice answered, that if the court upon any evidence were satisfied, that the witness was withdrawn by the procurement of the prisoner, the deposition ought to be read, otherwise not—whereupon,

Thomas Hardy deposed, that Thomas Snell, his apprentice, was lately run away from him, and that his fellows said,

said, he told them before he went away, that lord *Morley's* trial was to be shortly, but he would not be there.

The court not thinking this evidence sufficient, the depositions were not read. *Ibid.*

In lord NETTERTVILLE's case, before the lords of Ireland, 17 Geo. 2. Indictment for murder.

The counsel for the crown produced the *capias*, *alias* and *plures*, that issued upon an indictment, found against *Nicholas*, lord viscount *Netterville*, of New-grange, in order to introduce the reading of the examinations of *Owen Whelan* and *Edward Buckley*, who were dead, to the reading of which writs the prisoner objected. On hearing counsel on each side and debating the point, it was resolved, the writs should not be read; and on a second question being debated and put, viz. whether the examinations of *Owen Whelan*, which had been taken *ex parte*, before the coroner, should be read, he being dead, it was resolved unanimously that it should not. 3 *Lords Journ. of Ireland* 538.

The last rule is illustrated in a civil case, *BENSON, v. OLIVE, exchequer, Michaelmas, 5 Geo. 2.*

This was the trial of an issue directed to the court of exchequer, the deposition of a witness, who had been examined in 1672, was offered to be read, without any evidence of his being dead, relying on the presumption from length of time, which would entitle the reading of a deed of that date.

REYNOLDS, C. B. refused to let it be read, saying a deed had some authenticity, from the solemnity of hand and seal. But if proper searches or inquiry had been made, and no account could be given of him, he would have admitted it at such a distance of time. 2 *Stra.* 920.

BULLER, J. B. R. recognized as law, the rules in the case of lord *Morley*. He says, if due diligence be used, and it is made manifest (by evidence) that the deponent has been sought for and cannot be found; or if it be proved, that a witness was subpoenaed and fell sick by the way, it is said that his deposition may be read, for that in such case he is in the same circumstances as to the

the party that is to use him, as if he were dead. *Bull Nij. Pri.* 239.

Rule the Sixth.

Where witnesses cannot be produced *viva voce*, by reason of death, sickness, or absence by procurement, their depositions may be read *for* as well as *against* a prisoner, on a trial for high treason: but not where they might have been produced in person. 2 *Hawk. ca.* 46. 1 *Str. Tr.* 723.

This rule, so far as it respects the depositions of a dead witness, appears to have been fully argued and settled, in the *KING, v. WESTBEEB, Old-Bailey Sessions, January, 1739.*

The prisoner was indicted for larceny: the question argued was, whether the information of *Curtres Lulham*, an accomplice, deceased, taken in writing, upon oath, against the prisoner, before *LEE, C. J.* pursuant to the statutes of *Philip & Mary*, should be received in evidence?

Sir Dudley Ryder, attorney-general, after proving the fact of *Lulham's* death, insisted upon reading these depositions, made before the chief justice, as evidence against the prisoner.

Serjeants *Hayward* and *Barnardiston*, opposed their being read, and contended that as the act of *God*, which the law says shall not work an *injury* to any man, had by *Lulham's* death deprived the crown of the opportunity of producing him *viva voce*, the admitting his deposition to be read in evidence would *injure* the prisoner, in as much as he would lose the benefit which might otherwise have arisen from a cross-examination.

The attorney-general, and *Strange*, solicitor-general, replied, and the point was very much debated, But,

COMYNS, C. B. and *CHAPPEL, J.* over-ruled the objection, and admitted *Lulham's* information to be read; though they said it would not be conclusive unless it were strongly corroborated by other testimony. *Leach's Cr. Ca.* 2 *Edit.* 12. 3 *Edit.* 15. And vide the *King, v. the Inhabitants of Eriswell.* 3 *Term. Rep.* 712. *Ante ca.*

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The KING, v. HENRIETTA RADBOURNE, *Old-Bailey, July session, 1787*, supports the rule, that depositions, judicially taken, and proved to the court, pursuant to the statute of *Philip & Mary*, may be read in evidence after the death of a witness.

The prisoner was tried for the murder of her mistress, *Hannah Morgan*. The deceased, while languishing under several wounds, which proved mortal, was examined by two magistrates, who, in the *presence* of the prisoner, took down her deposition, in writing, stating in substance the circumstances of the assault and battery under which she suffered. The whole of these examinations, one of the magistrates declared on his oath was heard by the prisoner, that they were distinctly read over to her in the presence of the deceased, who signed them, that they contained a correct account of what she said, and that he signed them as having been taken before him as a magistrate for the county where the fact was perpetrated.

Garrow, for the prosecution, contended, that Mrs. *Morgan's* deposition was admissible in evidence on two grounds. *First*, as the *declaration* of a person who had received a mortal wound from the hand of a murderer, and who was, at the time the declaration was made, lingering under a well-founded apprehension, that her life was in imminent danger. Vide *Ante ca. confession*.

Secondly, that it was admissible as an information, taken by a magistrate under the statute of *Phil. & Mary*, for it had been given in the *presence* and *hearing* of the prisoner, upon an oath lawfully administered to the deceased, who had thereby called God to witness, that what she said was true; and who had, in the presence of the prisoner, made an additional attestation of its truth, by putting her signature thereto: for that any thing that was said, either by a prosecutor, a prisoner, or a witness, in the presence and hearing of each other, although said in common conversation and under no solemnity, was admissible evidence in all courts, both criminal and civil; and the circumstance of Mrs. *Morgan's* testimony before the magistrate, in the presence of the prisoner, having been reduced into writing, instead of destroying its admissibility rendered it more eligible, in as much as what

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was said was thereby rendered more certain and less liable to be mistaken. *Ante* 14.

The COURT received the deposition as evidence, referring to the JUDGES among other questions, this question, whether the information of *Hannah Morgan* was admissible, and they held it was. *Leach Cr. Ca. 3 Edit. 512*

Rule the Seventh.

The evidence of a witness, given *viva voce*, in the presence of the prisoner on trial, may, at the desire of the prisoner, be compared with the facts which such witness has previously sworn to in his depositions before a justice of the peace, in order, by comparison, to see whether he has varied in his testimony. 1 *St. Tr.* 723.

This rule is founded on principles of justice; and shews, that the prisoner is intitled to the same evidence for his defence, as the crown is for his conviction. And since the abrogation of that inhuman exemption, derived from the civil law, which denied to the prisoner the privilege of examining witnesses in his defence, as was the case, until the grievance was removed by statute: it has been held, that the prisoner is intitled to the benefit of every species of evidence as fully as the crown. *Stat. 1 Mar. stat. 1. ca. 1. Irish, 9 Ann. ca. 6. sec. 6. Stat. at large, vol. 4. 263. 4 Blackf. Comm. 353.*

The last rule is illustrated in the case of lord STAFFORD, tried for high treason before the LORDS, at *Westminster, anno 1680. 32 Car. 2.*

In this case it was admitted, that the depositions taken from a witness, before a justice of the peace, might, at the prisoner's desire, be read on the trial, in order to take off the credit of the witnesses, by shewing a *variance* between such depositions, and the *viva voce* evidence given in court. 2 *Hawk. Pl. Cr. ca. 46. 3 St. Tr. 130 to 136.*

NOTE. It is not the practice in the inferior courts to read such depositions, or give copies of them, at the desire of the prisoner; but for the JUDGE to look into them and compare the facts they contain with the *parol evidence*

evidence given by the witness to the jury. And the reasons assigned for refusing to read them out, or give copies is, that the depositions often contain the names of offenders not on trial, or not in custody, and also facts which do not relate immediately to the prisoner, but to others implicated in the offence, the disclosure of which might tend to the prevention or impeding of public justice, by warning such offenders to fly, and by revealing the evidence of the crown, intended to be used on their prosecutions.

Rule the Eighth.

It is now also agreed, that where a witness at a subsequent trial, varies from his own evidence, given on a former trial, in relation to the same matter, such variance may be given in evidence to invalidate his testimony on the latter trial. 2 *Hawk. P. C. ca. 46.*

In the *KING, v. RICHARD LANGHORN, esq; Old-Bailey, anno 1679, 31 Car. 2.* before NORTH and SCROGGS, *C. J's.* Several witnesses were called, and admitted to impeach the testimony of *Titus Oates*, by shewing a variance in his testimony.

And in consequence of his evidence, *Mr. Langhorn*, the prisoner, in his defence submitted to the court, that if he had proved any one point, in answer to that which *Oates* had given in evidence not to be true, then he ought to be set aside; and he pointed out the several variances in the evidence given by the impeached witness. Vide the *King, v. Finney. Ante 4.*

The evidence however was admitted, but its effect was done away by the court.

The CHIEF JUSTICE said, they were all *popists*, and in a general cause; and in his charge observed, that though the witnesses were strangers to *Oates*, they were not strangers to the errand they came about. "*They came,*" said his lordship, "to defend all the Roman catholics, whom we would hang here for a plot, and they are sent over for that purpose, as far as their testimony can go. But," he added, "how far that is, though they are not upon their oaths, (for the law will not

" permit it) I must say to you in favour of the prisoner
 " at the bar, as I did to the jury yesterday, you must
 " not take it therefore as if it were mere talk and no
 " more, nor reject them too much because they did not
 " swear; they would swear 'tis likely, if the law would
 " allow it." 2 *St. Tr.* 906, 907.

NOTE. Compare this case to that of the *KING, v. FINNEY*, and the improvement of the law in favour of the subject, upon trials for crimes, by the admission of witnesses on oath, and the construction on evidence rendered doubtful, by the proof of contrary facts, and the merciful charges of the judges in such cases must create the most pleasing sensation and confidence in every man, who is a friend to that pure administration of justice, which is the strongest protection to political freedom and social happiness. *Vide Ante 4.*

Rule the Ninth.

Though justices of the peace cannot hear and determine treason, by virtue of their commission of the peace, nor take an indictment of that offence, yet they may receive examinations and informations on charges of treason of the parties brought before them, and certify them as directed by the statute of *Phil. and Mary*. 1 *Hale P. C.* 305.

Rule the Tenth.

And such informations or depositions of a witness, being taken in writing upon oath, administered by a justice of the peace as they ought to be, and being certified to the gaol delivery, may be read in evidence against the defendant, not only if the informant be dead, but if he be unable to travel, and sworn so to be. 1 *Hale P. C.* 305. 2 *Hale P. C.* 284. *Vide Similar rule in respect to informations before the coroner. Ante 285.*

HALE says, some have been of opinion, that if the witness was bound over and appear not, the informations may be read, which seems to be questionable. *Ib.*

Rule

Rule the Eleventh.

In the case of informations or depositions, taken before a justice of the peace, the rule by which they are admitted as evidence, is the same as in admitting confessions judicially taken, pursuant to the statutes; that is, oath must be made on the trial, either by the justice or by the coroner, or the clerk who wrote them, that they are the true substance of what the informer or other witness gave upon oath, when examined. Vide *Ante* ca. 6. p. 41. Rule 6.

Rule the Twelfth.

And in such case, information upon oath, taken before justices of the peace of one county, may be transmitted before justices of gaol delivery of that county where the offence was committed; that is to say, if the offender were brought before that justice, *quare tamen*, because the offence was out of his jurisdiction. 1 *Hale P. C.* 305, 306. Yet see *Dalton*, ca. 111. p. 299. accordant. *New Ed.* ca. 164. p. 554.

Rule the Thirteenth.

But depositions of a witness taken by the coroner, or informations taken before justices of the peace and certified to the gaol delivery, pursuant to the statutes of *Philip and Mary*, are not evidence whereon to ground a conviction for petit treason, if the party be living though unable to travel, or kept out of the way by the prisoner, or by his procurement. *Fos.* 337.

The above rule, taken from the opinion of *Foster*, is grounded on *stat. 5 Edw. 6. English*, which never was enacted in *Ireland*.

Rule the Fourteenth.

But it hath been adjudged, that depositions taken before a coroner, upon an inquisition of death, *super visum corporis*, cannot be given in evidence upon an appeal for the same death; because it is a different prosecution from
that

that wherein they were taken. 2 *Hawk. P. C. ca.* 46.
2 *Roll.* 460, 461. 1 *Siderf.* 325. 2 *Keb.* 384.

There are many instances in the reigns of queen Elizabeth and James the first, wherein the depositions of absent witnesses were *allowed* as evidence in *treason* and *felony*, even where it did not appear but that they might have been produced *viva voce*. 2 *Hawk. P. C. ca.* 46.

History, and also the State Trials, the most authentic and satisfactory records of the temper and politics of the times, verify the above observation. For example:

In the duke of NORFOLK's case, high treason, 1546.
37 *Hen.* 8.

THOMAS's case, 1 *Mary.* *Dyer* 99, 100. *Ant.*

ABINGTON's case, who with *Tilney, Jones, Travers,*
Cbanock, Bellamy and *Gage*, were tried for high treason.
15 *Sept.* 1586. 2 *Eliz.*

In this case the confessions of *Babington* and others, who had been attainted of treason, were read in evidence against the prisoners. 1 *St. Tr.* 134, 135.

UDNALL's case, tried on *stat.* 13 *Eliz. ca.* 2. *Croydon*
assizes, 1590, 13 *Eliz.* for feloniously writing and publishing a seditious and scandalous libel, called "the Demonstration of Discipline." 1 *St. Tr.* 168, 172.

The earl of ESSEX's case, before the LORDS, *Westminster*, 1600, 43 *Eliz.* for high treason. The examination of *Witherington*, not taken in the presence of the earl, was read against him. 1 *St. Tr.* 198, 200.

Sir WALTER RALEIGH's case, at a *commission of oyer and terminer*, at *Winton*, 1603. 1 *Jac.* 1.

In this case POPHAM, C. J. ANDERSON, GAWDIE, and WARBURTON, J's. sat as judges, and sir *Edward Coke* prosecuted as attorney-general: the examination of lord *Cobham* was offered in evidence against the prisoner, to the admission of which sir *Walter* objected, he desired lord *Cobham* might be produced and sworn, and observed, that the examination was neither subscribed nor avouched by his lordship. Lord *Cecil*, one of the commissioners, answered, "It is the accusation of lord *Cobham*, it is the evidence against you, must it not be of force without his subscription? I desire to be resolved by the judges,
" whether

“ whether by the law it is not a forcible argument of evidence ?”

The JUDGES answered, “ My lord it is !”

Raleigh replied, “ The king, at his coronation, is sworn, in omnibus judiciis suis equitatem, non rigorem legis observare. By the rigour and cruelty of the law it may be a forcible evidence.” The lord chief justice then told him, “ This is not the rigour of the law, but the justice of the law; else, when a man hath made a plain accusation, by practice, he might be brought to retract it again.” And the examination of *Cobham*, and several others were then read ! 1 *St. Tr.* 211, 219.

In lord AUDLEY’s case, before the LORDS, for a rape on his wife, &c. 7 *Car.* 1. The countess’s examination was read against the earl. 1 *St. Tr.* 388.

The doctrine and practice held out and followed in the above cases, by the officers of the crown, in the reigns of the *Tudors* and *Stewarts*, and received as law by the judges acting under the influence of the court, and holding their places, as they then did, *durante bene placito*, is strongly reprobated by *Foster*, who considers the reading of the State Trials, in those reigns, as “ doing so much penance.” *Fof.* 234.

Neither have those records of oppression passed unnoticed in Ireland. In the KING, v. PETER FINNERTY, indicted for a libel, at a commission of oyer and terminer, *Dublin*, Dec. 1797, 38 *Geo.* 3.

Curran, of counsel for the defendant, adverting to the prosecutions of former times, when the true principles of jurisprudence were perverted; and when accusation insured conviction, addressed the jury thus:—

“ Does history give you a single instance in which the state has been provoked to these conflicts, except by the fear of truth, and by the love of vengeance?—
 “ Do you read that *Elizabeth* directed any of those state prosecutions against the libels which the divines of her times had written against her catholic sister, or against the other libels which the same reverend gentlemen had written against her protestant father?—
 “ No—we read of no such thing; but we know she did bring forward a prosecution from motives of personal
 “ resentment,

“resentment, and we know that a *jury* was found time-
 “serving and mean enough to give a verdict, which she
 “was ashamed to carry into execution. The learned
 “counsel drew you back to the times that have been
 “marked by these miserable conflicts. You have been
 “carried back to the state prosecutions of former years,
 “were they instituted to promote the welfare of the
 “country? Or was it when the government was sinking
 “under the crumbling ruins of the falling empire it-
 “self? when the temples of justice were profaned
 “with the convictions of a *Russell* and a *Sidney*? I see
 “you turn your thoughts to the reign of the second
 “*James*, I see, you turn your eyes to those pages of
 “governmental abandonment, of popular degradation,
 “of expiring liberty, of merciless and sanguinary per-
 “secution—when language died away in the hearts of
 “the people—when humanity had no ear, because
 “liberty had no tongue—to that miserable period, in
 “which the fallen and the abject state of man might
 “have almost been an argument in the mouth of the
 “atheist and of the blasphemer, against the existence of
 “an all-just and all-wise cause—if the dying fury of the
 “*Stewarts* had not prepared the glories of those patriots
 “who established the Revolution, and thereby refuted
 “the impious inference, by shewing that if man de-
 “scends, it is not in his own proper motion—that it is
 “with labour and with pain, and that he can continue
 “to sink only, until by the force and pressure of the
 “descent, the spring of his immortal faculties acquires
 “that recuperative energy and effort which hurries him
 “as many miles aloft.” *Finnerty’s trial, MS. by Lea*
Mac Nally, jun. and the trial by Ridgeway, 62, 63.

Rule the Fifteenth.

But though the depositions of a witness, taken by a
 justice of the peace in the presence of the prisoner, pur-
 suant to the statute of *Philip and Mary*, is admissible
 evidence on the trial of the prisoner; yet if they be not
 judicially taken as the statutes direct, they cannot be
 read. 2 *Hawk. P. C. ca. 46.* 13 *Edw. 4. 3.*

As

As in the KING, v. WILLIAM WOODCOCK, *Old-Bailey, January sessions, 29 Geo. 3, 1789.*

The prisoner was indicted before EYRE, C. B. ASHURST, J. and ADAIR, recorder of *London*, for the wilful murder of *Sylvia Woodcock*, his wife.

It appeared in evidence, that the deceased was found in a ditch, and had received eight wounds. She was so exhausted by loss of blood as to be apparently dead, but recovering her senses, Mr. *Read*, a magistrate, attended her at the poor-house, and found her in a state of perfect recollection.

He told her he was a magistrate come to take her examinations, and admonished her to speak the truth, and as she appeared sensible of the impiety and dangers of falsehood he administered an oath to her, and received her information, which he reduced in her own words into writing. He afterwards read this information over to her with great deliberation, and gave it to her to sign, and she made her mark on the paper in approbation of its contents. The magistrate then signed it himself, and being proved on the trial, it was read in evidence.

It also appeared from the evidence of the surgeons, that she died in about eight and forty hours after the examination had been taken, and that it was impossible from the first moment that she could live long; but that although she retained her senses to the last moment, and repeated the circumstances of the ill usage she had received, she never expressed any apprehension or seemed sensible of her approaching dissolution.

The evidence of the *information, or declarations* of the deceased, was of a very pressing and urgent nature against the prisoner.

The COURT on these circumstances, took into consideration this question, "Whether the evidence which had been obtained from the deceased, could legally be left with the jury?"

EYRE, C. J. therefore stated the case to them, independent of that evidence, and then delivered his opinion on the admissibility of the examination, to the following effect:

Great as a crime of this nature (*murder*) must always appear to be, yet the inquiry into it must always proceed upon the rules of evidence.

The most common and ordinary species of legal evidence, consists in the depositions of witnesses taken *on oath*, before the jury in the face of the court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give.

But beyond this kind of evidence there are also two other species, which are admitted by law.

The one is the *dying declaration* of a person who has received a fatal blow. The other is the *examination* of a prisoner, and the *depositions* of the witnesses who may be produced against him, taken officially before a justice of peace, by virtue of a particular act of parliament, which authorizes magistrates to take such examinations, and directs that they shall be returned to the court of gaol delivery.

This last species of deposition, if the defendant should die between the time of examination and the trial of the prisoner, may be substituted in the room of that *viva voce* testimony which the deponent, if living, could alone have given, and is admitted of *necessity*, as evidence of the fact.

In the present case, a doubt has arisen with the court, to which doubt I entirely subscribe; whether the examination of the deceased, taken in writing at the poor-house by Mr. *Read*, the magistrate, is an examination of the nature I have described?

It was not taken as the statute directs, in a case where the prisoner was brought before him in custody; the prisoner therefore had no opportunity of *contradicting the facts it contains*. It was not in that part of Mr. *Read's* duty, by which he is, on hearing the witnesses, to bail or commit the prisoner; but it was a *voluntary* and *extra-judicial act*, performed at the request of the overseers; and although it was a very proper and prudent act, yet being voluntary and under circumstances where the justice was not authorized to administer an oath, it cannot be admitted before a jury as evidence; for no evidence

ence can be legal, unless it be given upon oath judicially taken. *Leach's Cr. Caf. 2 Edit. 397. 3 Edit. 563.*

But the above deposition was read, as the dying declaration of the party who made it. *Ante 37.*

In the KING, *v.* DINGLER, *Old-Bailey, September sess. 1791*, before GOULD, J. the same point occurred. This was an indictment for murder. Mr. *Addington*, a justice of the peace, said he took the depositions of the deceased upon oath, while she lay in a languishing state in the dispensary, the prisoner not being present.

Garrow, counsel for the prisoner, objected to the reading of those examinations. He argued, that the law is precisely the same, whether the examination taken be of the person whose death is charged upon the prisoner, or of any other ordinary witness who has been examined to the transaction by a magistrate, and who had died subsequent to that examination. Taking the information offered in evidence, to be that of any other person besides the woman deceased, and that such person died since he was examined before the justice, could his examination be received in evidence? Certainly not.

Let us illustrate, by shewing the mischiefs that must result from receiving such an examination.

It may happen, where death is the consequence of a duel, or a *rencontre*, or in many other instances, that there is but a single witness present. Now suppose that witness goes before a magistrate, and deposes by whose hand the homicide was committed, and dies before the trial; shall his information, though sworn to, and in writing, taken behind the back of the accused, and not containing *all* the facts and particulars the witness knew, and could depose to if alive, but containing so much as will justify the committal merely, be read in evidence on the trial? Certainly not.

Suppose this same informant to live until the trial, though he should depose on that trial, that the deceased assaulted the prisoner, that the prisoner was reluctant to return the assault, and offered terms of reconciliation, and that the prisoner was obliged to use a deadly weapon in his own defence; certainly, though on such evidence, by cross-examination, the party so assailed should

be discharged of the indictment by the jury: yet by the summary mode of proceeding against him now proposed, that is, by admitting the information, sworn before the magistrate as evidence, the witness being dead, the party accused would stand at this bar liable to a capital conviction, on the testimony of a man, who meant no wrong indeed, but who had only disclosed so much as was necessary to his committal.

The deceased woman might have recovered after the examinations, and then the offence would have been different.

ROSE, recorder, was for receiving the evidence—

Garrow, in continuance. There is an authority of considerable weight exactly in point. It expressly shews that this examination, under the circumstances attending it cannot be read, and he stated the *King, v. Woodcock. Ante 257.*

The answer to the objection, as it is understood at present is, that the statute has authorised the magistrate to take the examination of the prisoner, and the informations of witnesses; to return them to the court of gaol delivery, and if the witnesses should die before the trial of the defendant, then the information of the witnesses, taken before the magistrate judicially, should be read in evidence.

The consequence of the law is, that if an information has been taken pursuant to the statutes of *Philip and Mary*, and is certified to the sessions of *oyer and terminer*, that *then*, if the occasion requires, and if the evidence given in the information, is let in by the death of the witness who swore it, it may be read.

But the information offered in evidence has not been taken by the magistrate, pursuant to the direction of the statute—it has not been taken judicially. This appears,

First, by the language of the statute. *Secondly*, by the circumstances of the case. *Vide the stat. Ante*

The language of the statute is this: that the justice or justices, have nothing to do but with a man coming before them to be committed.

This

This is an information, *not* taken in the course of a judicial proceeding. The prisoner was not present—the prisoner was not on his defence. The justice might have held a judicial examination in the hospital, and strictly in pursuance of the statutes, and might have thus brought the prisoner before him, in which case this information might have been read.

The COURT, on consulting, refused to receive the evidence, relying on the *King, v. Woodcock*, as a determined case in point. *Ante* 257. *Leach's Cr. Ca.* 568. *M. S.*

The KING, *v.* the INHABITANTS of ERISWELL, *Banc. Reg.* 30 *Geo.* 3. appears relevant to the last rule, in many particulars.

This was a pauper's case on the poor laws of England. The pauper had given examinations touching the place of his last residence. No proceedings were had in consequence of this examination until the order of removal, which was the subject of appeal, was applied for and made.

The pauper, from the time of the examination being taken, continued to reside in *Icklingham, All Saints*, for about five years, and without becoming chargeable to that parish, when he became *insane*, and continued in a state of insanity to the time of his removal to *Eriswell* parish.

On the part of the *respondents*, this examination was offered in evidence, and objected to on the part of the appellants, but was received by the court of quarter sessions, the hand writing of the justices who took the same being first proved.

The question before the king's bench was, whether this evidence was admissible.

Bower and *Sayer* argued in support of the admissibility of the examination.

Partridge, Barnard, and Hay, against receiving it.

The COURT was divided on the question.

NOTE. This abridgement of the report is confined to the admissibility of the examination.

GROSE, J. The question is, whether the information taken before the magistrates is competent evidence of the pauper's settlement in *Eriswell*, to warrant the justices

lices to make the warrant of removal, and the court of quarter sessions in confirming it?

To prove the facts of the appellant's case an *examination* of the pauper, taken before two magistrates, was produced, and it appeared that the pauper, since his examination, had become *insane*, and still continued in that state.

The objection to admitting this *examination* as evidence, is, that an agreement must be proved either by the parties, or the witnesses to it; and that the *oath*, either of the party or the witness, is not admissible in evidence, when it is given in the *absence* of another who is to be affected by it.

To this it is answered *first*, that this examination may be read, because it is like a judgment upon which no execution has issued. My answer is, that it is not like such a judgment, for in the first place, before such a judgment can be obtained, the party to be affected by it must have had an *opportunity* of being heard; he must have been served with a writ, or have had notice of the proceedings. And *secondly*, the judgment must have been given by a court of *competent jurisdiction*; but in the present case the justices had *not* jurisdiction to administer the oath. By the 13 & 14 Car. 2. they are empowered only to remove; and unless they administer the oath for the purpose of removing it, it is no more than if a justice of another county administered it. Here there was no removal, and they had no power, that appears but for that purpose.

Secondly, however, it is said, that this examination is competent, because it is as good evidence as that of a person who had heard the pauper say, that he had been hired for a year and served it, that such evidence would have been competent, and therefore this is so.

As to it being as good evidence as that of a person who heard the pauper say he had been hired, there is this material difference, that had the person been *present*, such person might have been *cross-examined*, as to all that passed between him and the pauper, if any part of it were to be heard. But here we read only what the over-
seers

feels chuse to examine to, and what the magistrates thought fit to state.

Next—is such evidence competent? it is what is commonly called *hearsay evidence* of a fact. Now it is a general rule that such evidence is not admissible, except in some few particular cases where the exception may be as ancient as the rule. A pedigree may be proved by reputation, prescriptive rights may be so proved; and yet in cases of prescription, those very persons who are permitted to give evidence of what they may have heard from dead persons, respecting the reputation of the right, are not permitted to state facts of the exercise of the right, which the deceased person said they had seen: and there is no principle upon which this evidence is admissible that may not extend to proving by *hearsay* any agreement whatsoever.

Here the learned judge stated a number of *cases* respecting paupers and parishes, which had been cited at the bar to shew the evidence offered was admissible as *hearsay* evidence, and as given upon oath before the magistrates: but he observed, that *no principle* was stated to take the case out of the general rule, to shew why *hearsay* evidence of the agreement should be permitted in this case any more than in any other.

He then proceeded to the point immediately relevant to this chapter. Before the stat. 1 & 2 *Phil. & Mar. ca. 13.* and 2 & 3 *Phil. & Mar. ca. 10.* a deposition taken before a justice of the county where the murder was committed, was not evidence, even though the party died or was unable to travel. Why? because although the justice had jurisdiction to inquire into the fact, the *common law* did not admit a person accused to be affected by an examination taken in his *absence*, because he could not cross-examine, and therefore that statute was made. To this point the clause in the mutiny act, which expressly authorizes the magistrates to take the examinations of persons enlisting is extremely strong. It is clear, that in an action by an executor of the pauper, if it were necessary to prove this agreement, the affidavit of a witness who was dead, taken before a judge who was to try the cause would be incompetent to be read after his death.

death. When then, and upon what *principle* could this man's deposition upon oath become evidence after his death? no such rule of evidence could exist before the statutes of *Charles the second*: suppose the case had existed the next year, and the year after the pauper had gone before two justices and made the oath he did, and after that upon his death, two other justices had removed his family upon that examination, could this court have determined that hearsay evidence of the hiring was good, or that an oath taken before two magistrates (not for the purpose of removal in the absence of the other party) would have been good? or suppose the act of parliament had passed two years ago, should we now say it is good? no, that would be against the known law of evidence, for, as hearsay evidence, it is hearsay evidence of a fact; and as an examination upon oath, and not in the presence of the opposite party, nor taken with an intent to remove, it is *extrajudicial*. If at that time it were admissible, when did it become so? will the practice of the justices at their private meetings or at the quarter sessions make it so? surely it is too much to say, that such practice shall alter the law of evidence prevailing through the kingdom, in the courts above and at the assizes; as judges of *nisi prius* we do not affect to alter or make new law; how then shall it be competent to justices of the peace to do so? but even were we disposed to conform to a rule of evidence adopted by some justices of the peace, what are we to say in cases where one court of quarter sessions differs from another in their rules? so it is in this case, in some counties they admit this evidence, in others they reject it; we must say that such precedents ought not to guide us, but we must be governed by the known rules of evidence which are to be found in our law books. If then the decisions of the courts below cannot alter the law when it is grown into law by the decisions of the courts above, upon what principle shall it now be decided? none is laid down; but it may be said, that it is in this case wise and discreet to depart from the general rule of evidence, and in this instance to admit of hearsay evidence of a fact, or evidence on oath administered

in the absence of the adverse party. I dread that rules of evidence shall ever depend upon the discretion of judges; I wish to find the rule laid down and to abide by it; in this case I find the general rule; I find no decided authority that forms an exception to it; and nothing but a clear incontrovertible decision upon the point, and not the concession of counsel, or the *obiter dictum* of a judge, ought to form an exception to a general rule of law, framed in wisdom by our ancestors, and adopted in every case, except where the exception is as ancient as the rule. The order should be quashed.

BULLER, J. supported the admissibility of the evidence. In this case it appears, that the pauper was taken before two justices, by the overseers of the parish of *Tiklingham*, where he then resided, for the purpose of being examined as to the place of his last legal settlement: that he was examined on oath before them and signed his examinations.

The pauper afterwards became, and has ever since continued *insane*, and the sessions being of opinion that the examination was good evidence, upon the authority of that confirmed the order of removal.

The question reserved for the opinion of this court is, whether under these circumstances, the examination ought to have been read in evidence.

This case has been argued on two grounds, *First*, that it is admissible, as an examination taken on oath by justices who had a competent authority. *Secondly*, that it is evidence as a declaration under the hand of the pauper.

I am of opinion, that it is admissible evidence in each of those lights. But, before I state the grounds on which I hold it admissible, it will be proper to premise, that I consider the pauper as *dead*, he being in such a state as renders it impossible to examine him, and if he were *dead*, it is admitted at the bar, that there are several cases in which it has been held, that what he said might be received in evidence.

The first thing to be considered is, whether this evidence be admissible as an examination taken on oath by persons having a competent authority.

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It seems to be agreed, by those who argued at the bar, that if the justices had made an order of removal immediately on taking the examination of the pauper, the examination then would have been a *judicial act*, and would have been evidence: indeed, the second section of the act calls it a judgment. I agree, that if the taking of the examination were not a judicial act, but was merely *coram non judice*, it is not evidence as an examination on oath. The question then is, whether this were a judicial act or not: it must be so at the time it was taken, or it cannot become so at all; and if an immediate removal might have been founded on it, it is a full proof that this was a *judicial act*.

The power of the justices is founded on *stat. 13 & 14 Car. 2. sect. 1.* which enacts, "That it shall be lawful, upon complaint made by the overseers of any parish, for any two justices, by their warrant, to remove and convey any person likely to become chargeable to such parish, where he was last legally settled, unless he give sufficient security for the discharge of the parish, to be allowed by the said justices."

The statute does not in words say any thing about the mode of examination; but wherever a power of judging and determining is given, an authority to examine on oath is virtually and necessarily included in it. Whatever the justices do in pursuance of that statute, is *judicially* done, and unless the rule be general, this absurdity would follow; if the justices are of opinion, on the examination, that the pauper ought to be removed, and do remove him, it is evidence; but if they are of opinion that the settlement is in the parish requiring the examination, and therefore he ought not to be removed, then it is not evidence; whereas in the latter case the reasons are much stronger why the examination should be evidence than in the former, because the parish officers are present at the examination and are parties to it, being the complainants and the persons causing the examination to be taken. But it never can depend on the judgment which the justices shall form for, or against the parish, whether the examinations in the case are or are not evidence, it must be reciprocal.

This

This examination is similar to the case of a deposition before a coroner, which has been long held to be good evidence, though the person accused be not present when it is taken, nor ever heard of it until the moment it is produced against him. 2 *Lev.* 180. *Kelyng* 55. Vide *Lord Morley's case. Ante*.

The coroner is to inquire into the causes and circumstances of the death of the deceased: the justices are to inquire to what parish the pauper belongs: both inquiries are general, and no particular persons are parties to them. Again, where depositions are taken before commissioners of excise, if the witness *die*, lord *Holt* was of opinion that they were good evidence. *Bredon, v. Gill*, 8 *Will.* 3. *B. R.* 2 *Salk.* 555. 1 *Lord Raym.* 219. *S. C.*

Where an act is judicially done, it is not necessary that the person to be affected by it should be present, in order to make it evidence against him, and therefore depositions taken by a justice of a person who afterwards died, though in the *absence* of the prisoner, must be read. So it was determined by all the judges in *Radbourn's case*, *Mich.* 1787. * *Ante*.

It is the same as to depositions taken under a commission from the court of exchequer. *Tooker, v. the Duke of Bedford.* 1 *Burr.* 146.

But an argument was drawn from the mutiny act, which it was said (by justice GROSE, *Ante*) made the *depositions evidence* in the case of soldiers, and therefore it was inferred from thence, that the depositions were not evidence in any other case. That act affords a very different inference. The first act which contains any

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clause

* This case, as reported by *Leach*, varies materially in fact from the statement by Mr. justice BULLER; he states, that the information of the deceased was taken in the absence of the prisoner; but in *Leach* it appears that it was taken by a regular magistrate, pursuant to the statute of *Philip and Mary*, and *deliberately read over to him*, in the *presence and bearing of the prisoner*, upon an oath lawfully administered. [The words in italics are omitted by the learned judge.] *Leach Cr. Ca.* 2 *Edit.* 363. 3 *Edit.* 512. Vide *Ante*.

clause for examining soldiers respecting their settlements, is 16 Geo. 2. which enacts, That it shall be lawful for two or more justices of the county, or place where any soldier shall be quartered, in case such soldier has either a wife or child, to cause him to be summoned to make oath of the place of his last legal settlement; and such soldier is thereby directed to obey such summons, and to make oath accordingly; and such justices are required to give an attested copy of such affidavit to the person making the same, or by him delivered to his commanding officer, in order to be produced when required. Provided, that in case any soldier shall be again summoned to make oath as aforesaid, then on such attested copy of the oath by him formerly taken being produced, such soldier shall not be obliged to take any further or other oath with regard to his legal settlement, but shall leave a copy of such attested copy of examinations, if required. That act says nothing about the examination or the copy of it being evidence, but most probably the legislature meant or understood, that they would both be so; for the object was, to prevent the soldier being called upon to attend the justices more than once, and at the same time to substitute as good a thing as an examination in lieu of it, for the benefit of the parish. But in the 32 of Geo. 2. or between that time and the 20 Geo. 2. the legislature had under their consideration what would be evidence, and accordingly they inserted in the above clause the following words: "Which attested copy shall " at any time be admitted in evidence as to such last " legal settlement, before any of his majesty's justices " of the peace, or at any general or quarter sessions of " the peace," So the law stands now; and the *copy* only, and not the *original*, is by the act made evidence, which could only be done on the idea that the *original* was evidence before. If it had been necessary to have enacted that the original should be evidence, two words would have done it; and it is impossible to suppose, that the legislature meant that the *copy* should be evidence, when the *original* was not. This law therefore affords a strong argument, that the examination is admissible evidence.

Again,

Again, what was said by lord chief justice LEE, in the case of the *King, v. Colin St. Aldwin's*, is a very material authority to prove, that this examination was admissible in evidence. There an order of removal of a bastard made in *Wilts*, was founded on the examination of the mother in *Middlesex*. LEE, chief justice, there said, "The only material evidence which appears to have been given, was the examination of the mother, which ought not to have been admitted; for it is a general rule in evidence, that the deposition of a living witness ought not to be received, unless it appear that the witness himself could not be produced to be examined ORR TENUS; and therefore as the evidence here given has an original defect, which cannot be supplied, this order ought to be quashed." Read by J. BULLER, from a manuscript note of justice Clive's.

It clearly therefore must have been his opinion, that had the mother been dead, or in a state like this pauper (*insane*) of incapacity to be examined ORR TENUS, her depositions might have been received in evidence.

The second ground on which this has been argued to be evidence is, that it is a declaration under the hand of the pauper. This introduces the general question, whether *hearsay evidence* from the person under whom the settlement is claimed can be received. This question has been so often decided, it would be sufficient to mention the cases only; but, as different opinions are entertained on the bench upon the subject, I shall go somewhat more at large into the consideration of it. It is said, that there is no case wherein *hearsay evidence* has been allowed where the party is *alive* and able to be produced. I agree to that position; but, here the party is *qua dead*, and not able to be produced. Here the learned judge cited a number of cases in support of his position from *Burrowe's Settlement cases*, and other authorities, and added, that in cases of pedigree, and other cases *hearsay* and *reputation* are good evidence: each has authority to support it, but he could state no principle in favour of them. 3 Term. Rep. 718.

The true line for courts to adhere to is, that wherever evidence, not on oath, has been repeatedly received and sanctioned

sanctioned by judicial determinations, it shall be allowed : but beyond that, the rule that no evidence shall be admitted, but what is upon oath, shall be observed. It would be easy to state or imagine a conversation of which a man gave an account of his own habits and transactions in life, his residence, his connections and relations, which would be equally material in tracing a title, as in investigating a question of settlement : and it would be strange, if such a conversation after the father's death, should be sufficient to enable the son to recover ten thousand pounds a year, and yet should not be sufficient to give his son a settlement as a pauper. Here he cited several cases wherein hearsay evidence has been received.

3 *Term. Rep.* 719. *Vide Ante* 14.

ASHURST, J. coincided with BULLER, but said that if the case was new, he should be strongly of opinion, that the evidence given ought not to have been received, as being hearsay evidence ; but thought that as certainty is so desirable in the law in general, and particularly in this branch of it, which relates to cases of daily occurrence, when a case is decided and acted upon, it is better not to overturn it. 3 *Term. Rep.* 720.

LORD KENYON, C. J. concurred with GROSE. He said, all questions upon the rules of evidence, are of vast importance to all orders and degrees of men ; our lives, our liberty, and our property, are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity, and the good sense in which they are founded : they are not rules depending on technical refinements, but upon good sense, and the preservation of them is the first duty of a judge. Evidence should be given under the sanction of an oath, legally administered ; and, in a judicial proceeding between the parties affected by it, or those who stand in privity of estate or interest with them. I admit that this man, who is proved to be *insane*, is to be considered as to this purpose in the same state as if he were *dead* : and it has been decided, that in such cases the party's hand writing may be proved, as if he were actually dead. Then it is said there are two grounds

grounds on which his examination may be received, as to both of which I agree with my brother GROSE.

First, as an examination taken upon oath before two justices of the peace, who it is argued had authority to take it.

Secondly, as to a declaration of the party examined.

The *first* depends on *stat. 13 & 14 Car. 2.* that statute empowers the justices to make an order of *removal*, it does not give them an express power to *examine*, but as an examination is necessary to get at the facts upon which the judgment of the magistrates is to proceed, there is an incidental power given, allowing them to examine when they are called upon to exert their power of removal. But in this case they were not applied to for the purpose of making an order of removal; the overseers called upon them for no other purpose but to examine the pauper, all the proceedings therefore were extra-judicial; and the examination on oath might just as well have been taken before the parish clerk, and would have been just as much intitled to credit as this. But I will go further: if this examination had been taken in order to found an order of removal upon it, still I should be of opinion that it would have been no better, as far as respects the present question, than a mere declaration of the party, the effect which I shall examine presently.

Examinations upon oath, except in the excepted cases, are of no avail, unless they are made in a cause of proceeding, depending between the parties to be affected by them, and where each has an opportunity of cross-examining the witness; otherwise it is *res inter alio acta*, and not to be received.

It has been said, that this is a *judgment* of the justices, as appears by the 2 *sect.* of the 13 & 14 *Car. 2.* which has the word *judgment* in it, and that it is no objection to it being a valid, that the parties to be affected were not present. But I think the word judgment in the section referred to is only used as equivalent to the word *opinion*; and as to a judgment being binding, though the party to be affected was not present, that will scarcely be found to be so unless in cases where the party has
had

had an opportunity of being present, or was constitutious, neither of which was the case with the parish now to be affected, but as to them it was altogether *res inter alios acta*.

It has been said, that there are cases where *examinations* are admitted, namely, before the coroner, and before magistrates, in cases of felony. That observation is in support of the general rule, rather than in destruction of it. Every exception that can be accounted for is so much a confirmation of that rule, that it is become a *maxim exceptio probat regulam*.

Those exceptions alluded to, are founded on the statutes of *Philip and Mary*, and that they go no further is abundantly proved. Besides, the examination before the coroner is an inquest of office; it is a transaction of notoriety, to which every person has a right of access; and, writs of *ad quod damnum* have been frequently set aside for want of this notoriety. *Vide the statutes Philip and Mary. Ante 38.*

But without stating the cases which occur on this head, I will do little more than refer to the case of the *KING, v. PAINE*. That was not loosely decided, but was the opinion of this court, assisted by the court of common pleas. In *Salkeld* it is expressly said, that the rule cannot be extended further than the particular case of felony; and, in the other book, the chief justice declared, that the depositions were not evidence, and a weighty reason is given, namely, "the defendant not being present when they were taken before the mayor, and so had lost the benefit of cross-examination." 1 *Salk.* 281. 5 *Mod.* 165. *Ante* 14. 2 *Hawk. P. C.* ca. 46. *sec.* 1. 10.

Secondly, considering this as a declaration of the party. Declarations of the members of a family, and perhaps of others living in habits of intimacy with them, are received in evidence as to *pedigrees*; but evidence of what a mere stranger has said, has ever been rejected in such cases; and that has been always understood an excepted case, and to stand on reasons peculiar to itself. His lordship then examined all the cases cited; declared he had never known such evidence received at the sessions during

during his practice; that Mr. justice FOSTER had on a similar occasion said, "he had heard that *communis error facit jus*, but he hoped he should never hear that rule "insisted upon, to set up a misconception of the law, "in destruction of the law." He would not enter more into the point, being clear it would be most dangerous to adopt it. The *mistakes* of judges, provided they became universal, would, according to that doctrine, become *rules of law*. An usage commencing at soonest, since the 13 & 14 Car. 2. contrary to law, and working injustice every day it was persisted in, would supercede the law. Upon the whole, his lordship was most clearly of opinion, that this *examination* was not admissible evidence. It was *ex parte*, obtained at the instance of those overseers whose parish was to be benefitted by it, and behind the backs of the parish against whom it has now been used, without leaving an opportunity of knowing what was going on, or attending to have the benefit of a cross-examination, and then concluded, "I regard the "question as of the last importance, and as putting in "danger the LAW OF EVIDENCE, in which every man in "the kingdom is deeply concerned." 3 Term Rep. 719, 720. 5 Term Rep. 373. *The King, v. Ravenstone*.

The above case, and the exceptions stated therein, strongly support the general rules of common law, laid down in the present chapter, and those chapters which treat of hearsay evidence, confessions, and informations. The great principle argued and depended on by three of the judges, admit, that except in cases of felony, and that by statute, informations, or examinations of witnesses taken before magistrates in the absence of the party charged, cannot be admitted as evidence either at common law or by statute, and establishes this general rule, that courts of law will not take cognizance of matter *extra-judicial*. 2 Hawk. P. C. 303. 13 Edw. 4. 3.

And therefore, even in the king's bench, if on any indictment whatsoever, except only an inquisition of death found by the coroner on view, if a person not mentioned in it be found guilty of the crime whereof others are indicted, yet such finding shall not serve for

an indictment against him, because it was wholly *extra-judicial*. Ibid. *Lord Netterville's case*. *Ante*.

And sir MATTHEW HALE, on this principle, in his chapter concerning the commission of the peace, says, if A. commits a felony in the county of B. where he lives, and goes into the county of C. and is there taken, a justice of peace of the county of C. may take his examination and informations in the county of C. though the felony were committed in the county of B. 2 *Hale P. C.* 51.

But HALE adds *query*, whether upon his arraignment in the county of B. those examinations can be given in evidence? "*I have not allowed them*; because, though "the justice may commit and examine, and give an "oath to the informers; yea, and bind them over to "give evidence, or commit them, yet that is but for "necessity of preserving the peace, for he hath really "no jurisdiction in the case." *Ibid.*

Rule the Sixteenth.

But now it seems settled, that informations upon oath, taken before justices of the peace of one county, may be transmitted before justices of gaol delivery of that county where the offence was committed, that is, if the offender were brought *before* that justice, *quare tamen*, because the offence was out of his jurisdiction. 2 *Hale P. C.* 285.

Yet Vide *Dalt. ca.* 111. p. 299. *accordant.* *New edit. ca.* 164. p. 544.

For though the justice hath not an original jurisdiction of the cause, yet he hath a consequential jurisdiction thereof having the party before him, and it is in order to the preservation of the peace.

Rule the Seventeenth.

A deposition sworn before a jurisdiction deemed not relevant to the criminal issue, cannot be given in evidence to support a prosecution by indictment or information.

As

As in the KING, v. WELSH, *Mich. 1652, Ban. Reg.*
Welsh was indicted on *stat. 3 Hen. 7.* which makes the forcible abduction of women felony. It appeared that he forcibly and against her consent, took away a gentlewoman named *Pickring*, and that therefore a temporary act of parliament was obtained, enabling commissioners therein named, to hear and determine that marriage, and to dissolve it, if there was cause.

In that cause Mrs. *Pickring* herself was examined, touching the manner of the marriage, as a supplemental proof, and died hanging the suit.

Welsh was afterwards indicted upon the statute for this fact, and it was moved, by the counsel for the crown, that this examination of Mrs. *Pickring* might be read in evidence against the prisoner.

The COURT denied the motion. *First*, because it was a proceeding according to the civil law, in a civil cause. *Secondly*, because that suit was originally at the instance of Mrs. *Pickring*, and her own cause; and though she be, according to the civil law, examinable, as a supplemental proof, yet it was a cause for her own interest, and therefore, at common law, not allowable, though the commissioners that took the examination were judges, constituted by that which was then allowed to be an act of parliament. 2 *Hale's P. C.* 285.

Rule the Eighteenth.

If a justice of peace takes informations in a case of high treason, it seems these cannot be read in evidence upon an indictment of treason, because high treason is not within the commission of the peace; but it is of use only as an information upon oath, which they may take, though they cannot proceed upon it, for all treason is a breach of the peace. 2 *Hale's P. C.* 286.

But *quare tamen*, if it be not allowable to be given in evidence. *Ibid.*

And in the Irish statute of *Charles 1.* founded on the English of *Philip and Mary*, the word "treason" is introduced.

The reasons why these examinations and informations are allowable in evidence, subject to the precautions stated, is, because the justices of the peace are judges of record, and the informations before them upon oath, are authorized and required by act of parliament; and they are judges of the crimes upon which the informations are taken. 2 *Hale P. C.* 284, 285.

The author of "*The Theory of Evidence*," in his reading of the statutes of *Philip and Mary*, says, depositions of witnesses may be read when the witness is dead, but not while the witness is living, for they are not the best evidence the nature of the case is capable of. *Theor. Evid.* 30.

Yet, says the same author, they may be read where a witness is sought and cannot be found; for then he is in the same circumstances, as to the party that is to use him, as if he were dead. *Ibid.* Vide same principle supported by BULLER, justice, in the *King, v. the Inhabitants of Ellesmere*. 3 *Term Rep.* 707. *Ante*.

So, if it be proved that a witness is subpoenaed, and fell sick by the way; for in this case likewise, the deposition is the best evidence can be had, and that answers what the law requires. *Theor. Evid.* 30. Vide 1 *Burn's Just. Tit. Evid. Bull. N. P.* 239.

NOTE. The case of sir JOHN FENWICK, attainted by act of parliament, 8 *Will. 3. anno* 1696, has been occasionally cited as an exception to the rules laid down in this chapter; but that proceeding cannot be considered as a precedent in a court of law, inferior to the high court of parliament, for it was avowedly supported on the principle of *necessity*, the most dangerous of all political excuses, for innovating the ancient, known, and established rules of law.

In this case the commons, after long debate, on a bill to attain sir *John* of high treason, there not being two witnesses, which the statute of *Will. 3.* then recently enacted, required, permitted to be read a deposition of a person named *Goodman*, who was absent, taken before Mr. *Vernon*, a justice of the peace, when sir *John* (the person accused) was *not* present.

But

But the admission of this evidence was acknowledged, by many of those who supported, as well as by all who opposed the bill, to be against the usual course of law.

The objections to reading the informations were—

First, Sir John Fenwick was not present when they were taken, and not being present or privy to the taking of them, had no opportunity given him to cross-examine or to contradict Goodman, the person who had sworn them.

Secondly, If these informations be admitted as evidence, then every thing sworn behind a man's back, in any case whatever, may be admitted.

Thirdly, In civil cases, no depositions or examinations of a man can be made use of as evidence: of course, they cannot be admitted on a trial for life.

Fourthly, No deposition of a person can be read, though beyond sea, unless in cases where the party against whom such deposition has been made, was privy to the examination, and had an opportunity to cross-examine the witness: or to examine others to his credit, in order to prove him infamous and incompetent.

Fifthly, In criminal prosecutions, such evidence cannot be admitted; and in an appeal of murder, if depositions be taken before the coroner, and there be an examination of witnesses upon the indictment, though the appeal be for the same fact, and in order to bring the defendant to punishment, yet in that case, these depositions cannot be read, because it is another suit. The indictment is at the suit of the crown, the appeal at the suit of the plaintiff.

Sixthly, The law of England requires witnesses to appear and give their testimony *viva voce*; and then the court sees if their testimony be credible, or not; and this may be collected from their very countenances and their manner of delivery, and their falsehood may be discovered by questions put to them by the party accused, or by examining them to particular circumstances, which may develop the falsity of the accusation, or prove it to be a scheme, or a conspiracy.

Seventhly, A man may swear a deposition reduced into writing, whose conscience, or fear of detection, would prevent

prevent him from publicly accusing the prisoner face to face: and experience hath shewn repeatedly, that there are men who will calumniate the innocent privately, yet will not dare to justify the same in open court.

Eighthly, As the information was not taken in the presence of sir *John Fenwick*, if the informant had *died*, his information could not have been read in evidence. In case he had been *sick*, or had *withdrawn*, without the privity of the prisoner, his information could not have been read. Nay, if withdrawn by the privity of the prisoner, though that would have been good grounds to put off the trial, the information could not be read in evidence.

Ninthly, The jury must go *secundum allegata et probata*. Evidence of *prima facies* must be evidence of living persons. *Per sir Thomas Powis, and sir Bartholomew Shawer.*

Tenthly, On the trial of lord *Mordaunt*, who was tried before the high court of justice, they would not allow of this kind of evidence. *Sir Richard Temple.*
Ante

Eleventh, Because lord *Hale* denies such evidence to be legal. *Mr. Harley.*

Twelfth, Reading the information amounts to the receiving of hearsay evidence, which ought not to be received. *Mr. Howe.*

Thirteenth, Men have been sworn against before justices, and even grand juries, whom the witnesses have not known, when they came face to face.

Fourteenth, In the case of sir *Robert Stanley*, eleven witnesses were produced before the grand jury, and when they came to give evidence face to face, before the petty jury, the first witness did not know the prisoner. *Mr. Brotherton.*

The reasons given on the other side for reading the informations admit, that they ought *not* to be received in a court of law, and that they ought *not* to have been read until the informant was *dead*.

The CHANCELLOR of the EXCHEQUER said, "I am
" for reading of this paper, though I don't think it evi-
" dence equivalent with *viva voce*, nor do I think that
" in like cases it ought to be admitted in the courts of
" law.

“ law. But I think in your proceedings in parliament
 “ it ought to be read, whether it be an affidavit or not.

Those who supported the chancellor of the exchequer,
 argued : that the commons were not bound by the forms
 of the courts.

But this was replied to from the other side, that
 though the house was not bound by the forms of inferior
 courts, they were bound by the rules of evidence, of
 natural justice, and of equity, each of which were in-
 novated by the evidence offered, for reason, justice, law,
 and equity, were the same every where, and should pre-
 vail on every occasion. § *St. Tr.* 69. *Burnet's Hist. of*
his own Times.

Rule the Nineteenth.

In *Ireland*, it was enacted, *anno* 1796, “ That if any
 “ person who hath given, or shall give information, or
 “ examinations upon oath, against any person or persons,
 “ for any offence against the laws, shall after the twen-
 “ tieth day of February, one thousand seven hundred
 “ and ninety-six, and before the trial of the person
 “ against whom such information or examination hath
 “ been, or shall be given, be *murdered*, or violently put
 “ to death ; or so maimed, or forcibly carried away and
 “ secreted, as not to be able to give evidence on the
 “ trial of the person or persons against whom such infor-
 “ mation or examinations were given, the information
 “ or examination of such person, so taken on oath,
 “ shall be admitted as evidence, on the trial of the per-
 “ son or persons, against whom such information or ex-
 “ amination was given.” *Irish stat.* 36 *Geo.* 3. *ca.* 20.
sect. 12.

Rule the Twentieth.

“ Provided always, that the information or examin-
 “ ation of a witness secreted, shall not be evidence,
 “ unless the person secreted shall be found, on a *collateral*
 “ *issue*, to be put to the jury trying the prisoner, that he
 “ was secreted, &c. by the person on trial, or by some
 “ person

"person or persons acting for him or in his favour." *Ir. Stat. 36 Geo. 3. ca. 26. sect. 13.*

CHAPTER XXVIII.

In what cases the character of a Prisoner, and the character of a Witness may be put in Issue; of the Evidence that may be produced on such issue; and of a party's right to impeach the credit of a witness produced by himself.

Rule the First.

IT has been heretofore held, that a prisoner cannot examine to character, except in *favorem vite*, when charged on a capital indictment: but the rule is now wisely extended to all cases of *misdemeanors*. And this appears to have been the ancient practice.

As in the KING, *v.* BENJAMIN HARRIS, 32 Car. 2. at Guildhall, London, indicted for a seditious libel.

SCROGGS, C. J. admitted the defendant to call a witness to his character, who deposed, he knew him to be a fair conditioned, quiet, and peaceable man; and that he was so reputed among his neighbours; and never was reputed to be a person who would scandalize the king or the government. 2 St. Tr. 1038.

In the KING, *v.* J. MOCKLER, *Commis. oyer and terminer, Dublin, December, 1797.* Indictment for uttering counterfeit shillings, knowing them to be such.

Downs, J. admitted the prisoner to give evidence of character, as a fraud was charged, and the punishment was not *certain*, but *discretionary* in the court.

CHAMBERLAIN, J. has also admitted evidence to character in misdemeanors, on the same principle, though formerly he refused it. And,

In the KING, *v.* KEOGH, *at bar, Easter 1798, B. R. Ireland.* Indictment for a riot and assault in the *Marshalsea*. The COURT admitted the defendant to produce witnesses to shew his conduct to be peaceable, &c. MS.

In

In the *KING, v. JOHN BROWN*, *commission of oyer and terminer, Dublin, December 1798*. Before lords KILWARDEN and CARLTON, chief justices, the point appears finally settled.

The prisoner was indicted, at common law, for uttering a forged instrument, purporting to be a promissory note for money of sir *Thomas Lighton*, and co. for one pound fourteen shillings and three halfpence.

Mac Nally, counsel for the prisoner, offered evidence of character, on the authority of the *King, v. Mockler*, above cited.

Jonas Greth, counsel for the crown, objected on the old rule, that evidence of character was only admissible in *favorem vite*, on capital charges, but the indictment here was not capital, but merely a misdemeanor.

Lord CARLTON, C. J. Com. P. said he had conversed with many of the judges on the subject now before the court, who thought, as he did, that in cases where character was put in issue, evidence of such a nature might be very material: for example, suppose a man of very great property was indicted for perjury, where the object to be obtained by the perjury was a mere trifle, for instance a shilling: or suppose a man to be charged with a riot or assault, who was known to be of a peaceable and quiet disposition; evidence of character in such cases, directly encountering the nature of the charge in the indictment, must be of the last importance.

His lordship then cited the *King, v. Robert Carr, Guildhall, London, 32 Car. 2.* on an information for a libel against the government. Sir WILLIAM SCROGGS, who was the judge, and who was not likely to grant a prisoner in such a case, any privilege that he was not intitled to, admitted the defendant to give evidence of his character and deportment.

Lord chief justice HOLT, his lordship observed, also admitted this species of evidence, and all the judges in Ireland, upon the late circuits, uniformly received evidence of loyalty, in cases where the charge was of a seditious nature, though amounting only in point of law to a misdemeanor.

Lord KILWARDEN, C. J. *Ban. Reg.* agreed with lord CARLTON, and observed, that the reason generally assigned for

for the admission of such evidence in capital cases, and capital cases only was altogether unsatisfactory to his mind. It was said to be in *favorem vite*, but, he had no conception, according to the principles of sound sense and right reason, that character could be evidence in a case affecting the life of a man, and yet not evidence in a case affecting his freedom, his property, and his reputation. *MS.*

In the KING, *v.* CRAWLEY, *commission of oyer and terminer, Dublin, February 1802.* W. SMITH, B. in his charge to the jury, adverted to the evidence of good character which had been given for the prisoner. Character, he said, is of great weight in every case, and requires particular attention, when the charge is grounded on *circumstantial* evidence; for it then creates a greater degree of *doubt* than where the prosecution is supported by *direct* evidence. In the former case, evidence of character ought to be particularly attended to, because the jury is more or less embarrassed, and called upon to weigh the case with more scruple and doubt, from the very nature of the testimony. *Crawley's tri. reported by Leon. Mac Nally, jun. p. 65.*

Rule the Second.

In giving general character in favour of a prisoner on trial, the witness may assign in evidence, the *reasons* on which he gives that character.

So ruled in the KING, *v.* TIMOTHY BRECKNOCK, tried for murder, *at the assizes of Castlebar, county Mayo, April 1786, 26 Geo. 3.* before YELVERTON, C. B. and POWER, B.

The reverend *Henry Henry*, being examined to the character of the prisoner, said, he believed him to be the last man in the world who would have a thirst of blood, and he would give particular instances.

The *attorney-general* (*Fitzgibbon*, afterwards earl CLARE, lord chancellor) objected to such kind of evidence being admissible. He relied, that in giving evidence of character, general evidence only was to be received; and that particular instances could not be adduced.

Mr. *Stanley*, for the prisoner, contended, the clear rule of evidence was this, when a witness is called to impeach

impeach a man's character, he can only do it by *general* accounts of his conduct and behaviour, and he shall not be permitted to give evidence of *particular* facts, which the person impeached is not prepared to combat with evidence; for, no man is bound to defend every action of his life, when unprepared for that purpose. But this rule does not hold when you call a witness to support a man's character; for then the witness may not only give the prisoner a good character, but he may give his *reasons* for entertaining a good opinion of him.

This point, he said, was ruled at a *special commission of oyer and terminer*, held at *St. Margaret's-hill, Southwark*, on the trials of the rioters, 1780. A man was indicted on the *riot-act*, 10 Geo. 1. A witness called to give him a character; he gave him a good one; and said his reason for entertaining a good opinion of him was, that he knew him to be a dutiful son, and that he supported a helpless parent by his industry. An objection was made to the evidence; but,

LORD LOUGHBOROUGH, C. J. C. P. and GOULD, J. made the distinction taken, and ruled it to be proper evidence.

NOTE. There is a sound and a humane reason for admitting such evidence. The king is sworn at his coronation to administer justice in mercy: and therefore judges who represent majesty, sitting in the judgment seat, are called upon to receive such evidence, to ground and support a *recommendation* to royal clemency in such cases, where the evidence warrants it. And,

Lord KENYON's sentiment, though promulged in a capital charge of the first magnitude, may be well applied to all cases, where the character of the defendant comes in issue, "An affectionate and warm evidence of character, when collected together, should make a strong impression in favour of a prisoner, and when those who give such character in evidence, are intitled to credit their testimony, should have great weight with the jury." *The King, v. Thelwell, Old-Bailey, special commission oyer and terminer*, 1794.

Rule the Third.

If the *defendant's* character be put in issue by the prosecution, the prosecutor may examine to particular facts; for it is impossible without it to prove his charge; but in the particular case of an indictment for *barratry* this cannot be done, without giving notice to the defendant what particular facts are to be given in evidence. *Bull. N. P.* 296.

Rule the Fourth.

Except in the instances given, the prosecutor cannot enter into evidence of the defendant's character; unless the defendant enable him to do so, by his calling witnesses to support it; and, even then, the prosecutor cannot examine to particular facts. *Bull. N. P.* 296.

Rule the Fifth.

The credit of a *witness* can only be impeached, by general accounts of his character and reputation: not by proofs of particular crimes of which he was never convicted. *Vide Ante Brecknock's case. Ante* 322.

And therefore it has been repeatedly ruled, that where a witness is impeached in character, by the testimony of another witness called for that purpose, the first question must go to shew, whether the party impeaching be acquainted with the general character of the other witness, and if he answers in the affirmative, he may then be asked, whether such witness be a person deserving credit in a court of justice, upon his oath.

As in the *KING, v. ROCKWOOD, commission of gaol delivery, Westminster, 8 Will. 3.* by Holt, C. J. 4 *St. Tr.* 461.

And in the cases of the reverend *William Jackson, James Weldon, and John Leary, 1795; Thomas Kennedy, and Patrick Hart, in 1796; Patrick Finny, in 1797; and John and Henry Shears, John M'Cann, William Michael Byrne, and Oliver Bond, in 1798; who were severally tried for high treason, at Dublin. Vide Ridgeway's rep. of these trials. And Ante* .

Rule

Rule the Sixth.

A party shall never be permitted to bring general evidence to discredit his own witness.

So ruled by the HOUSE OF LORDS of Great-Britain, in the case of governor *Hastings*, on an impeachment for high crimes and misdemeanors, *anno* 1789; on this reason, for that admitting such evidence would enable the party to destroy the evidence of the witness, if he spoke against him; and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit, if he spoke against him.

Rule the Seventh.

But if a witness proves facts in a cause which makes against the party who calls him; the party may call other witnesses to prove that these facts were otherwise, *Bull. N. P.* 297.

CHAPTER XXIX.

On a Bill of Exceptions to Evidence in Pleas of the Crown.

Rule.

NO bill of exceptions is grantable on an indictment of treason or felony, the statute of *West. 2.* 13 *Edw. 1.* §. 1. c. 2. c. 31. *cum aliquis implaciatur coram aliquibus justiciariis proponat exceptionem, &c.* having never been thought to extend to any such case. 2 *Hawk. P. C. ca.* '46.

In *ſir HENRY VANE's* case, *Trinity*, 14 *Car. 2.* *B. R.* Indicted for treason. The prisoner having been denied counsel, even to matter of law, he demanded among other things, whether matters done in Southwark, in another county, may be given in evidence to a Middlesex jury? The court said, that he was indicted for compassing

sing and imagining the king's death in Middlesex, and any overt-act to prove this imagination may be given in evidence, wheresoever it be acted. To which sir Henry prayed the benefit of a *bill of exception* upon the statute of *Westminster* 2. *cap.* 31. and prayed that the justices might seal it; which they all refused, and held that it lay not in any case of the crown. 2 *St. Tr.* 443.

After sir Henry's conviction, on the day he was brought up to receive sentence of death, he offered in his own defence a *bill of exceptions*, having previously desired that counsel might be assigned to him, which was denied. He then desired, that, according to the statute of *West.* 2. *ca.* 31. made the 13 *Edw.* 1. the judges would sign it; and this he urged so home, that the statute was consulted and read in open court, running in favour of the prisoner to this effect, "That if any man find himself aggrieved by the proceedings against him, before any justices, let him write his exception and desire the justices to set their seals to it."

He then, citing from lord *Coke*, that this act was made that the party wronged might have a foundation for a legal process against the justices by a writ of error, having his exception entered upon record in the court where the injury is done, which through the justices over-ruling it, they could not before procure, so the party grieved was without remedy, for whose relief this statute was made. The justices refusing to set their seals, the party grieved may have a writ grounded on this statute, commanding them to set their seals to his exception. This exception extends not only to all pleas dilatory and peremptory, &c. but to all challenges of any jurors, and any material evidence given to any jury by which the court is over-ruled.

Further says *Coke*, on this statute, if the justice or justices die, their executors or administrators may be proceeded against for the injury done. And if the judge, or judges, refuse to seal the exception, the party wronged may in the writ of error take issue thereupon, if he can prove by witnesses, the judge or judges refused to seal it. 2 *Infr.* 427.

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The JUDGES over-ruled the point; and, as *sir Henry Vane* says, by such interpretation as themselves put on the statute, to wit, that it was not allowable in criminal cases for life. Whereby, continues *sir Henry*, this makes the law less careful for the preservation of a man's life, than any particulars of his estate, in controversies about which this statute is affirmed by them to hold. Whereas life is the greater, and innocent blood, when spilled, is irreverfible as to the matter—it cannot be gathered up again! The estate is the lesser, and if an erroneous judgment pass about it, it is reverfible upon traverse, writ of error, or otherwise.

The reason alledged by the JUDGES, as reported by *sir Henry*, for he reports his trial most accurately, was this, that if it be held in criminal cases for life, every felon in Newgate might plead the same, and so there would be no gaol delivery. *Sir Henry* answered, his case was not the case of common felons; but, he desired he might understand, whether they (the judges) would all give it as their common judgment, they would stand to, that what he desired was not his due by the law. By this means they were all put upon it one by one, to declare themselves in that point unanimously, denying him the benefit of that act, and their chief reason seemed to be, that it had not been practised for one or two hundred years. 2 *St. Tr.* 451.

As this case is reported by *sir Henry Vane*, it seems to be the opinion of the court, that such bill ought not to be granted in any capital case: but by other authorities it appears holden, that it is not grantable on any indictment. *Siderf.* 85. 1 *Keb.* 384.

KELYN, C. J. who was concerned on this trial, says it was resolved, that the statute of *West. 2. ca. 31.* which gives the bill of exceptions, extends only to *civil causes*, and not to criminal. The words of the statute are, "*Cum aliquis implacitatur coram aliquibus justiciariis, &c.*" and the intention never was, to give such persons liberty to put in bills of exception, for then there would be no trials of that nature ever discharged in any time, neither here (king's bench) nor in the circuits, if every frivolous exception which a prisoner would make, should be drawn
up

up in a bill of exception: besides, the court is always so far counsel with the prisoner as to see that he hath right, and if they find any thing doubtful, they of themselves will take time to advise. But the words of the statute are plain, as the court agreed as to this point. *Kelyng* 15.

In the case of the KING, v. lord GRAY, and others, who were convicted in London, it was moved in Chancery, that the lord keeper would grant a mandatory writ to the chief justice of the king's bench, to command him to sign a bill of exceptions, and they produced a precedent, where in a like case such a writ had issued out of chancery, to the judge of the sheriff's court in London.

The LORD KEEPER denied the motion, for that the precedent they produced was to an inferior court, and he would not presume, but that the chief justice of England would do what should be just in the case; for possibly you may tender a bill of exceptions that has false allegations in it and the like, and then he is not bound to sign it; for that might draw him into a snare; and if they had wrong done them they might right themselves by an action on the case. If this court has power to grant such a writ, it was discretionary only, as writs of error are in criminal cases, which are discretionary, and not *de cursue*: and said he had a collection of several cases, out of the old books of the law, that were given unto him by my lord chief justice Hale, which shew that writs of error, in criminal cases, are not grantable, *ex debito justitia*, but *ex gratia Regis*, and in such a case a man ought to make application to the king, and he will then refer it to his council, and if they certify there is error, the king will not deny a writ of error. 1 *Ver. Cba. Caf.* 175.

In modern times, since counsel have been allowed to prisoners in matter of law, and have been permitted to examine as to matter of fact, the court on doubting the legality of evidence offered, have generally saved the point of law, for the opinion of the judges, and in case of conviction on the facts, it now is the practice to respite sentence until that opinion be known; and in
England

England they often call on counsel to argue the exception taken before the judges at their hall in Serjeant's-inn. Many instances of this kind are repeated in *Leach's Cr. Ca.*

CHAPTER XXX.

Of the Evidence of Medical Men in cases of Poisoning.

SECTION THE FIRST.

THE proof from the attestation of persons on their professional knowledge, the French lawyers call proof by *experts*.

In proportion as experience and science advance, the uncertainty and danger from this kind of proof diminishes. *Gilb. Evid. by Loft.* 301.

Formerly, when the mother of an illegitimate child was indicted for the murder of the infant, if the lungs, being immersed in water, would float, it was held a proof on which surgeons might justify an opinion, that the child was born alive; the inflated lungs, in consequence of the air which had been drawn into them, having been rendered specifically lighter than the water.

But this presumption is now held insufficient, for that the air included in the vesicles of the lungs, from other causes, may produce this effect in the lungs of a still born child. Vide *Doctor Hunter's Essay on this subject.*
Post

In general it may be taken, that when the testimonies of professional men of known skill and just estimation are *affirmative*, they may be safely credited; but when *negative*, their evidence does not amount to a disproof of a charge, otherwise established by various and independent circumstances. *Gilb. Evid. by Loft.* 302.

Thus on a view of a body after death, on suspicion of poison, a physician may see cause for not positively pronouncing that the party died by poison; yet if the party charged be interested in the death; if he appears to have made preparation of poisons without any probable motive,

tive, and this secretly; if it be in evidence, that he has in other instances brought the life of the deceased into hazard; if he has discovered an expectation of the fatal event; if that event has taken place suddenly and without previous circumstances of ill health; if he has endeavoured to stifle inquiry, by precipitately burying the body, and afterwards on inspection, signs agreeing with poison are observed, though such as medical men will not positively affirm, could not have been owing to any other cause, the accumulative strength of circumstantial evidence may be such, as to warrant a conviction; since more cannot be required, than that the charge should be rendered highly credible from a variety of detached points of proof, and that the supposing poison to have been employed, stronger demonstration could not reasonably be expected to have been under all the circumstances producible. *Gilb. Evid. by Loft*, 382. Vide chapter on *presumptive evidence*. *Post*

On the circumstances above collected, captain DONNELLAN was convicted and executed at Warwick assizes, of murder, by poisoning with laurel water, fir *Theophilus Boughton*.

That conviction, however, did not give general satisfaction, and several publications appeared severely animadverting on the charge given by the learned judge *Buller*. The evidence of the medical men examined has also been strongly controverted; and at this day there are great doubts on the justice of the conviction.

In *Easter*, 23 *Geo. 3. B. R. Ireland*. The reverend *William Jackson*, who had been convicted in that term for high treason, was brought into court to receive judgment, and while his counsel were arguing in arrest of judgment, he fell at the bar * and expired. Next morning an inquest was held on the body.

* It appeared, that for some time previous to his dissolution, he discharged froth from his mouth, and perspired in a most extraordinary and violent degree; so much that while standing at the bar a vapour visibly issued from his head.

Mr.

Mr. *Hume* and Mr. *Adrien*, surgeons, were sworn and examined. They opened the body in the view of the coroner's inquest, and on inspecting the stomach, seemed to have a difference of opinion as to the *certainly* of his having died by poison.

They both agreed that the stomach was inflamed. Mr. *Hume* alledged that no sudden *affection* of the mind, however it might occasion *death*, could produce excoriation in the stomach. It was true, he said, where the patient died suddenly of the gout in the stomach, there were often found symptoms of inflation in that part of the stomach resting upon the gut, particularly when the stomach has been full. Being asked whether this appearance in the stomach might not have arisen from putrefaction as he had been so long dead. He answered, that it does not follow from poison, that the stomach in particular should putrify. He did not think the poison had passed from the stomach into the remainder of the system. It was probably prevented by spasm from circulating. Therefore the infection was entirely local, and the contents still rested in the stomach. He had known many die from agitation of mind, but then there were no such symptoms. He had been called to persons who had been poisoned by means of copper vessels, but never knew them to die suddenly. They generally vomit for twenty-four hours before death. The *usual symptoms* resulting from very violent poisons, were extreme distress and agitation of body, attended with profuse and deadly sweats. He did not think any man could live two moments with a stomach so affected. Never knew of any dying by metallic poisons without great pain: but heard that laurel water had been taken by sir *Theodosius Boughton*, of which he had suddenly died, and without probably, suffering much pain. Upon the whole, his opinion was, that Mr. *Jackson's* death must have been occasioned by poison.

Mr. *Adrien* was not so certain what the cause of inflammation might be, and thought it possible that the prisoner's death might have happened from very violent agitation; from the yellow tinge of his hands it might

appear how great a redundancy of bile had been lodged in the stomach.

Mr. *Hume* observed, that this matter did not so much appear to be bile, as the effect of corrosive sublimate or some such cause; and that violent and sudden agitation did not increase the secretion of bile, but on the contrary, obstructed all secretions; and that no stomach could contain so much bile, but would have vomitted it off, as every person affected by sea sickness does, whenever any quantity is thrown into the stomach; and further, that bile, so far from remaining upon the hands after washing, would, having the property of soap, assist in cleaning them, and would come off more readily with cold water than with hot.

Mr. *Adrien* then observed, that the secretion of bile was proved to be very redundant, there being near a pint resting in the gall-bladder; but gave due weight to Mr. *Hume's* reasoning on the locality of the affection, and proposed examining further into that fact; which being done, and it appearing that no part of the intestinal canal was affected, these gentlemen finally agreed:—that the death was occasioned by some unusually *acid matter*, taken into the stomach. And,

The verdict of the inquest was—"We find that the deceased *William Jackson*, died on the 30th of April, in consequence of some acid and mortal matter taken into his stomach; but how, or by whom administered, is to the jury unknown."

The contents of the matter contained in the stomach was afterwards analyzed, and appeared to contain *arsenic* and *laudanum*.

SECTION THE SECOND.

Of the effects and symptoms of poison, so far as they may be useful in investigating by evidence the cause of death, on an indictment for murder by arsenic.

The effect of poison when injected into the blood, or caused by the bite of venomous reptiles, or poisoned weapons, need not be mentioned here.

Poisons are exceedingly various in their operations.

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The *mineral* poisons, as arsenic and corrosive mercury, seem to attack the solid parts of the stomach, and to produce death by eroding its substance.

The antimonials seem rather to attack the nerves, and to kill by throwing the whole system into convulsions. And,

In this manner also most of the vegetable poisons seem to operate.

Doctor Black gives the following directions to the physician who happens to be called upon to give testimony, in cases where it is suspected that a person has died by the effect of arsenic.

He should answer every question put to him with caution, as the lives and reputations of many depend on his opinions.

The *first* question usually put is—whether from the symptoms of the patient, or the appearance of the body after death, he imagines the deceased died by being poisoned by arsenic? the symptoms attending the taking of arsenic are, in about a quarter of an hour, sickness at stomach, succeeded by vomiting, purging, burning pains in the bowels, heat, and thirst, pains and cramps in the legs and thighs, syncope and death.

But we must take care not to be deceived by erosions of the stomach, occasioned by the gastric juice, which has a power of dissolving the stomach after death. The difference is, that the arsenic occasions inflammation and blackness, whereas none appears in the other case. If the person escapes, he is in danger of being afflicted by marasmus, paralytic affections of the limbs, great debility, &c.

The *second* question generally asked is—whether any arsenic has been found in the intestines? the method of discovering this is as follows: the contents of the stomach and intestines should be taken out and washed in water; and any powder it contains suffered to separate. If any arsenic be mixed with it, it will fall to the bottom, and must then be examined by the following methods.

First, by laying it on red hot iron. If it be arsenic it will evaporate with melting, in a thick white vapour, and this may be shewn by the fortieth part of a grain.

Secondly,

Secondly, we may mix some of it with charcoal, in which state if it be arsenic, it will emit an odour very like garlic, but this will not be perceived unless it be mixed with charcoal or some inflammable matter.

Thirdly, we may inclose the powder with some charcoal between two polished bits of copper, the edges of which are moistened with a lute made of two parts of fine sand and one of pipe clay. The plates being then bound together with a wire, and the whole made red hot, the arsenical powder will thus be metallized, and penetrating the copper, a blackish skin will first appear upon it, which being rubbed off the parts which the arsenical vapour has touched, will appear of a whitish or lead colour.

We may metallize or reduce the arsenic in a glass tube by means of the glass flux. This is easily done by mixing two or three parts of the flux with one of the powder. This mixture being put into a small glass tube and a heat applied sufficient for volatilizing of arsenic; the greatest part of it will be metallized. One end of the tube is to be left open at first, and then stopped with lint or wool; the other made red hot; and if the tube be then broken, the arsenic is then metallized.

One grain of arsenic will be sufficient for all those experiments.

The first symptoms that ensue on the taking of arsenic shew, that it is of a highly inflammatory, caustic, and corrosive nature, with regard to the system in general, and the intestines in particular: the pulse becomes extremely weak and irritable, and this is attended with a kind of paralytic affection of the limbs, marasmus, &c.

Had these experiments been made in *Jackson's case* (*Ante* 330.) the coroner's inquest, on the evidence of the physicians could have ascertained, not only the cause of his death, but the specific poison used for that purpose: and in similar cases, whether of suicide or homicide, by poison or otherwise, wherever medical men, such as physicians, chymists, surgeons or apothecaries, can be procured, the coroner ought to call for and compel, on refusal, their attendance at the inquisition; the evidence of such witnesses being the most effectual means
of

of satisfying the consciences of the jurors, of bringing the guilty to punishment, and of establishing the innocence of those, who on slight circumstances, prejudice or malice may be suspected or accused.

SECTION THE THIRD.

A knowledge of the antidotes to this species of poison, may also be useful matter of evidence, as, on an indictment for administering arsenic, with an intent to murder by poison. Indeed humanity calls for a general publication.

Milk and oil have been recommended as antidotes: but the milk may curdle, and the oil will not mix with the fluids in the intestines. Mucilages therefore are the most adviseable; and whites of eggs have succeeded. After the violence of the first attack is over, a milk diet, opiates, &c. are proper, and sometime after electricity has been found of great service. *Encyclop. vol. 2. p. 355, 356. Dub. Edit.*

CHAPTER XXXI.

In what manner Witnesses are compellable to attend the Court, in order to give Evidence.

HAWKINS is of opinion, that in prosecutions for misdemeanors, the defendant may take out *subpoenas* of course: but that in capital cases he hath no right by the common law, to any process against his witnesses, without a special order from the court. 2 *Hawk. P. C. ca. 46.*

This appears in the KING, v. Colonel TURNER, *Old-Bailey sessions, January 15, Car. 2.* indicted for felony and burglary. After arraignment, the prisoner prayed of the court that they would make an order to bring in some witnesses he required, as necessary to his defence; and mentioned that they were ready to come, but had sent him word they dare not, unless they were summoned by an order from the bench.

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The LORD CHIEF JUSTICE answered, that those who chose to come in voluntarily might; but the law would not admit the court to summon witnesses; for when witnesses came *against* the king, the court could not put them to their oaths; much less can they precept them to come. 2 *St. Tr.* 505.

Rule the First.

“ All persons accused and indicted for any *high treason*,
 “ whereby any corruption of blood may ensue, shall
 “ have the like process of the court where they shall be
 “ tried, to compel their witnesses to appear for them at
 “ any such trial or trials as is usually granted to compel
 “ witnesses to appear against them.” *Stat. 7 Will. 3. sect.*
7. Irish 9 Ann. ca. 6. sect. 9. 4 Stat. at large, 263.

Rule the Second.

And now process may be taken out against witnesses for the prisoner of course, in any case whatsoever.

The compulsory process to bring in witnesses in criminal causes (which in *Ireland* is generally called a crown summons) is either by *subpoena* issued in the king's name, by the justices of oyer and terminer, gaol delivery, or the king's bench, where the plea of *not guilty* is to be tried, or the justices or coroner who take the examination of the person accused, and the information of the witnesses, may at that time (and this is the usual way) or at any time after, and before the trial, bind over the witnesses to appear at the sessions, and if they refuse to be bound over, commit them for their contempt on such refusal, and this is virtually included within their commission, by necessary consequences, upon the statute of 1 & 2 *Phil. & Mary, ca. 13. Irish 9 Ann. Ante* .
1 Hales P. C. 52. 282.

And if such witness, being bound over, neglect to appear, he shall forfeit his recognizance. 1 *Burn's Just.* 533.

Where a witness is a prisoner in execution for debt, he must be brought up by *habeas corpus ad testificandum* to
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give his evidence, otherwise his coming out of prison would be an escape. *Eliz. Cellier's case, Old-Bailey, 32 Car. 2. 3 St. Tr. 97. Sir John Friend's case, Old-Bailey, 8 Will. 3. 4 St. Tr. 599.*

But now such witness may (by statute) be brought up to give evidence, by rule of court. *Irish stat. 38 Geo. 3. ca. 26. sect. 2, 3.*

CHAPTER XXXII.

In what cases Witnesses may be allowed their Expenses.

Rule the First.

IN civil proceedings a witness is not obliged to attend, unless his expenses are tendered to him, pursuant to the 5 *Eliz. ca. 9.* and if after such tender he neglect to appear, he may be fined, according to the directions of that statute, or be punished by attachment for the contempt of the court, as the circumstances of the case appear to be: 2 *Ld. Raym. 1529. Wyatt, v. Wingford. 2 Stra. 1054. Small, v. Whitnill. 1150. Chapman, v. Pointon. 1 Blackf. Rep. 36. Bowles, v. Johnson.*

Rule the Second.

In criminal proceedings the rule is different, the common law holding, that justice supercedes every consideration of private inconvenience; and, therefore, that witnesses are bound unconditionally to attend the trial, upon which they may be summoned, and be bound over to give their evidence without any remuneration for their trouble or expenses.

Rule the Third.

A witness refusing to give evidence is guilty of a contempt.

On this principle in the *KING, v. CHRISTOPHER LOVE*, tried for high treason before the high court of justice, 3 *Car.*

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2. Mr.

2. Mr. *Jackson*, who was called as a witness, refusing to be sworn, was for his contempt fined five hundred pounds, and committed to the Fleet prison during the pleasure of the court. 2 *St. Tr.* 124.

HALE considered it a great defect of judicial administration, that a power should not be vested in the courts to allow witnesses their charges, as many times poor persons grew weary on attendance and bearing their own charges therein to their great hindrance and loss. 2 *Hale P. C.* 282.

But this grievance at common law has been remedied by several statutes, viz.

The COURT before whom any person has been tried and convicted of any fraud or petit larceny, or "other felony, at the prayer of the prosecutor, and in consideration of his circumstances, may order the treasurer of the county in which the offence shall have been committed, to pay such prosecutor such sum as the said court shall think reasonable, not exceeding the expences he shall appear to have been put to in carrying on such prosecution, making him a reasonable allowance for his time and trouble therein; which order the clerk of assize, or clerk of the peace, respectively, is hereby required forthwith to make out, and to deliver unto such prosecutor, on being paid one shilling, and no more, which order the treasurer shall forthwith pay to the prosecutor or his assigns." 25 *Geo.*

2. *q.* 36.

This statute having only removed the inconvenience as to prosecutors, it is further enacted, "That when any poor person shall appear on recognizance in any court, to give evidence against another accused of felony, the court, at the prayer and on the oath of such person, and on consideration of his circumstances, in open court, may order the treasurer of the county, or place where the offence was committed, to pay what sum to the court shall seem reasonable, for his time, trouble, and expence, which order the proper officer of such court shall make out, and deliver to such person, upon being paid sixpence; which order the treasurer

“ turer shall pay as aforesaid.” Stat. 27 Geo. 2. ca. 3.
Sec. 3.

And as this last recited act extends only to poor persons appearing on recognizance; and the 25 of Geo. 2. before stated, gives relief only where the offender is convicted. It is further enacted, “ That the court before whom any person has been tried and convicted, or tried and acquitted of felony; in case it shall appear that there was a reasonable ground for the prosecution, and that the said prosecutor hath *bona fide* prosecuted, may order upon the prayer of the said prosecutor, the treasurer of the county, riding, or division, in which the offence shall have been, or have been supposed to have been committed, to pay such prosecutor such sum of money as to the said court shall seem reasonable, not exceeding the expences which it shall appear he had been *bona fide* put to in carrying on such prosecution, making, in case the prosecutor shall appear to be in poor circumstances, a reasonable allowance for his trouble and loss of time, which order the clerk shall deliver, on receiving one shilling, and the treasurer shall pay as aforesaid.”

18 Geo. 3. c. 19.

And, by the same statute, it hath further enacted, that “ the court where any person shall appear by recognizance or subpoena, to give evidence, as to any felony, whether any bill of indictment be preferred or not to any grand jury, provided the said person shall in the opinion of the court, *bona fide*, have attended the said court, in obedience to such recognizance or subpoena, may order the treasurer to pay what expence to the said court it shall appear, the said person was *bona fide* put to by reason of the said recognizance or subpoena, making, in case he is in poor circumstances, a reasonable allowance for his trouble and loss of time, for which order the clerk shall receive sixpence, and the treasurer shall pay as aforesaid.” 18 Geo. 3. ca. 19.
sec. 8.

And it is also further provided by the same act, “ that the quarter session may alter or lay down such rules and regulations, concerning any costs and charges

“ charges to be allowed to any person by virtue of this
 “ act, as to them shall seem just; which rules and re-
 “ gulations having received the approbation and signa-
 “ ture of one or more of the judges of assize, shall be
 “ binding on all parties whatsoever, and no person shall
 “ be allowed a greater sum than according to the said
 “ rules so approved of, &c.” 18 *Geo. 3. ca. 19. s. 9.*

In IRELAND, prosecutors for treason or felony, detained from their business by necessarily attending at assizes, may have two shillings a day allowed them by *presentment*, if recommended by the judges. *Stat. 3 Geo. 3. ca. 28. sect. 18.*

END OF THE FIRST BOOK.

RULES OF EVIDENCE

ON

Pleas of the Crown,

ILLUSTRATED.

BOOK II,

☞ The first book treats of Witnesses, and of objections that affect their competency or their credit: of privilege from examination resulting from confidential situations: of evidence arising from the act of the defendant, as conversations, confessions, and examinations at common law: of evidence by statute, as confessions in cases of high treason, and confessions, informations, and examinations, before magistrates: Evidence of character, &c.

☞ This book treats of PAROL EVIDENCE, that is evidence delivered upon oath, in open court, in the presence of the defendant: of facts within the *knowledge* of the witness, when examined in chief, and on his *belief*, when under cross-examination.

CHAPTER

CHAPTER I.

Of the intrinsic and essential quality of the Evidence that must be given,

Rule the First.

THE first and most signal rule in relation to evidence is this, that a prosecutor must produce the *utmost evidence* that the nature of the fact is capable of; for the design of the law is, to come to legal demonstration in matter of right, and there can be no demonstration of a fact, without the best evidence that the nature of the thing is capable of. *Gilb. Evid. by Loft, 4. 2 Hawk, P. C. ca. 46.*

On this rule, which baron GILBERT calls "*most signal*," the learned judge observes, that a man must produce the utmost evidence that the nature of the case is capable of; for the design of the law is to come to *legal* demonstration in matters of right; and there can be no demonstration of a fact, without the best evidence that the nature of the thing is capable of: less evidence doth create but opinion and surmise, and does not leave a man the entire satisfaction that arises from demonstration: for if it be plainly seen in the nature of the transaction, that there is some more evidence that doth not appear, the very not producing it is a presumption that it would have detected something more than appears already. *Gilb. Evid. by Loft, 4.*

But the sense of this rule, when limited to its just construction is this, that it is not to be understood, that in every matter there must be all that force and attestation that, by any *possibility* might have been brought to prove it; and that nothing under the highest assurance possible, should have been given in evidence to prove any matter in question. To strain the rule to that height, would be an endless charge and perplexity; for there are almost infinite degrees of *possible evidence*, one under the other; and if nothing but matters of the highest assurance

rance might be given in evidence; the way of illustration of right would rarely attain the end. As for instance, no verbal contract could be proved, because a written contract carries with it a greater credibility; and consequently the unwritten contract would not be the greatest assurance that the nature of the thing is capable of. So a contract attested by two witnesses, gains more credit than a contract attested but by one, and therefore, by the same argument, one witness would be no good proof of a contract. *Ibid.*

The true meaning of the rule of law, that requires the greatest evidence that the nature of the thing is capable of, appears to be this, that no such evidence shall be brought, as *ex natura rei* supposes still greater evidence behind in the party's own possession and power: for such evidence is altogether insufficient and proves nothing: it even, as before intimated, carries a presumption contrary to the interest for which it was produced: for if the other greater evidence did not make against the party, why did he not produce it to the court? as if a man offers a copy of a deed or will, where he ought to produce the original: and therefore the proof of a copy in this case is no evidence, and cannot possibly weigh any thing in a court of justice. *Gilb. Evid. by Loft, 5. Bull. N. P. 294.*

This rule is illustrated in 6 *Mod.* 225, 248. *Ld. Raym.* 154, 746, 1292, 1371. 2 *Vern.* 471, 591, 603. *Ch. Pr.* 59, 64, 116. 10 *Mod.* 8. *Strange* 52, 6, 1122, &c. See also 3 *Salk.* 285, 6, 7. 2 *Salk.* 690. 7 *Mod.* 192. *Ld. Raym.* 730, 734, 5. *Barnard, K. B.* 243. *Vern.* 505.

The legal correctness and justice of the above rule and reasoning appear in the case of *HENRY, v. WATSON*, tried at *Norwich assizes*, 1787.

The action was for a malicious prosecution against the defendant, for perjury, strengthened by aggravated circumstances in the subsequent conduct of the prosecutor, who had caused to be advertised, "That the perjury" "cause went off in consequence of a defect in the indictment; but that a fresh bill would be preferred."

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The plaintiff proved the printed advertisement, by evidence of a copy delivered to the printer, by *Locke*, an agent for that purpose, of the prosecutor *Watson*, who swore that he copied it from one received from *Watson*. The defendant's counsel objected to this evidence; but, the JUDGE said, in common cases you are certainly right: but in this, *Watson* gave *Locke* one paper which he meant to be multiplied. He employed *Locke* as his agent. He entrusted him with agency, and therefore becomes answerable for his acts. The paragraph is admissible evidence. *Gilb. Evid. by Loft*, 55.

But though a man offers a copy of a deed or will where he ought to produce the original, from which a presumption arises, that there is something more in the deed or will that makes against the party producing the copy, else he would produce the original: yet if he proves the original deed or will, in the hands of the adverse party; or to be destroyed without his default, a copy will be admitted: because then such copy is the best evidence, the presumption of greater evidence being in the party's possession, being overturned by positive proof. *Bull. N. P.* 294. Vide *Le Merchant's case*. *Post*.

Therefore in *LUDLAM, on the demise of HUNT, Mich. 13 Geo. 3. B. R.* A question having arisen, whether a copy of a will, on which the title turned, could be produced from the register of the ecclesiastical court.

LORD MANSFIELD said, the case is clear, a man by losing the evidence of his title shall not lose his estate. The rule in all cases holds to take the best evidence which the case, *rebus sic stantibus*, according to its real circumstances will admit. If a copy cannot be produced you may go into parol evidence of the deed. *Gilb. Evid. by Loft*, 4, 5, in note.

Rule the Second.

Parole evidence shall not be admitted, to contradict an agreement in writing.

As in the case of *MERES, et al' versus, ANSELL, et al' C. P.* Trespass, *quare clausum fregit*, treading down the grass, &c. in *Milcroft*. Pleas, not guilty and a licence.

Lord

Lord MANSFIELD tried this cause at the assizes. Verdict for the defendant.

Leigh and *Glynn*, serjeants, moved to set aside the verdict and for a new trial, upon this ground, that lord Mansfield admitted *parol* evidence, which contradicted an agreement in writing, to which the same person who was admitted to give such *parol* evidence, was a subscribing witness, and had himself the custody of the written agreement.

Burland, serjeant, for the defendant, submitted, that *Matthews*, who gave the parole evidence, was the plaintiff's witness, and that what he had deposed *extra* the written evidence, was no more than an explanation thereof, which was frequently admissible.

The court were all clearly of opinion, that the verdict must be set aside, that no *parol* evidence is admissible to disannul and substantially to vary a written agreement; the *parol* evidence in the present case, totally annuls, and substantially alters and impugns the written agreement. Indeed, in some cases of *wills* and *deeds*, where there are two *John's* named, or two *Blackacre's* mentioned, *parol* evidence may be admitted to explain which *John* or which *Blackacre* was meant and intended by the *will* or *deed*. The rules of evidence are universally the same in courts of law and courts of equity. Suppose a bill in equity was brought by the defendant, to have a specific performance of this agreement, the court would not admit *parol* evidence.

You cannot depart from the writing, but may argue touching the operation thereof. If a man agrees in writing to sell *Blackacre* for one thousand pounds, shall *parol* evidence be admitted that he intended *Whiteacre* should also pass? It shall not. This appeared to be a wilful trespass, no licence was proved, the agreement only extends to taking the hay of *Boreham* meadow, and *expressio unius est exclusio alterius*. A new trial. 3 *Wils.* 375, 6, 7.

So in *LOWFIELD, v. STONEHAM*, executors. *Parol* evidence of a declaration by the testator, when *in extremis* was offered and opposed, as being contradictory to the plain words of the will: and the CHIEF JUSTICE said,

it could not be allowed, and that in the case of *Selwin, v. Brown*, the house of LORDS had refused it, even where it was to support the legal interpretation of the will. And lord HARDWICKE adhered to the same rule in the earl of INCHQUIN, *v. O'BRIEN*. *Caf. Temp. lord Talbot* 240.

Rule the Third.

In a criminal prosecution, though the defendant be possessed of the best evidence the nature of the case admits of, yet he cannot be obliged, or even legally required to produce it against himself.

ROE, *on the demise of HALDANE*, and others, *v. HARVEY*, in ejection. *Mich. 10 Geo. 3. Banco Regis*, illustrates this rule.

In this case the plaintiff *refused* to produce a conveyance, which he had in court.

LORD MANSFIELD, in delivering his opinion, principally laid stress upon this circumstance. He said the want of notice was no objection in this case, because they had the *deed in court*. The refusal to produce it was an unfair attempt to recover, contrary to the real merits: and being a deliberate refusal, by the advice of counsel, contrary to the recommendation of the judge, warranted the strongest presumption, "That the deed would shew, that neither of the lessors of the plaintiff had any legal title."

YATES, J. thought the plaintiff ought to have had a verdict. He founded himself upon the rules of evidence. Its coming out upon cross-examination of the witness, makes no difference: no more does the value of the estate. The plaintiff's counsel were not obliged to produce this deed: no man can be obliged to produce evidence against himself. The only consequence of *notice* to produce it would have been, "the admitting *inferior* evidence." He instanced in a case which happened before himself, when a poll-book, which lay in court, was refused to be produced: he held, they could not be obliged to produce it. And this determination was acquiesced in.

WILLES,

WILLES, J. It is reasonable that if one party is in possession of a deed, and refuses, after proper notice, to produce it, the other side should be admitted to prove the contents by inferior evidence. But there is no reason why the possessor of the deed should be allowed to give such inferior evidence, when he *can* give better if he pleases.

LORD MANSFIELD. In *civil* causes, the court will force parties to produce evidence, which may prove against themselves; or leave the refusal to do it, after proper notice, as a strong presumption to the jury. The court will do it in many cases, under particular circumstances, by rule before the trial; especially if the party from whom the production is wanted applies for a favour. But in a *criminal* or *penal* cause, the defendant is never forced to produce any evidence; though he should hold it in his hands in court. 4 *Burr.* 2484, to 2489.

So in the KING, *v.* CORNELIUS, *Trinity*, 17 *Geo.* 2. 1744, *Banco Regis*. Information for a misdemeanor, in taking of money in granting of licenses to alehouse keepers. The prosecutor applied for a rule to inspect the books of the corporation, but the court, on consideration, refused the application, as it would in effect, be obliging the defendant to furnish evidence against himself. 2 *Stra.* 1210, 1211.

In the KING, *v.* DOCTOR PARNELL, vice chancellor of *Oxford, Mich.* 22 *Geo.* 2. *B. R.* the same rule was observed on an information *ex officio*, by the attorney-general, for a misdemeanor in office. 1 *Blackf. Rep.* 37. *Post* 352.

LEE, C. J. said, that the court were all of opinion, that they could not make the rule absolute, and that they founded their opinion upon former cases. And the cases cited were, 2 *lord Raym.* 927, the *Queen, v. Mead*, where the reason given for refusing the rule was the maxim mentioned at the bar, "*that no man is bound to accuse himself.*"

Another strong case was, *Trinity* 17 and 18 *Geo.* 2. *Rex, v. Cornelius* (above cited) which was strongly debated on both sides by sir John Strange and sir Richard Lloyd, and all the cases were cited then, that have been

now cited. Time was taken to consider, there was a conference with all the judges of the court, and all agreed the rule could not be granted, *because it was a criminal proceeding*, and that the motion was, to make the defendants *furnish evidence against themselves*. The present case is rather stronger, because it is a prosecution for a crime of a *more public nature*, for unless it be such, this court hath no jurisdiction. And this is unlike a *quo warranto*, for that is a right granted by the crown, and the public books and records are the proper evidence on both sides. Rule discharged. 1 *Will.* 241.

The *REX, v. WORSENHAM*, and others. *Mich. 13 Will.* 3. is also in point. An information was preferred against the defendants, being custom-house officers, for forging of a bond, supposed to have been given by a merchant to the king for his customs. And motion was made on behalf of the prosecutor, to have the custom-house books in which the entries were made, &c. brought into court to convict the defendants. But the motion was denied, because the said books are of a private concern, in which the prosecutor has no interest, and therefore it would be in effect, to compel the defendants to produce evidence against themselves. And the court never make such rules but only of records or deeds of a public nature. 1 *Lord Raym.* 705.

Rule the Fourth.

But notwithstanding the last recited rule, that "in criminal cases the defendant cannot be even required to produce evidence against himself." It is now settled, that in respect to the production of secondary evidence by the prosecutor, there is no distinction between civil and criminal cases. Vide *L' Merchant's case. Post* 350.

Rule the Fifth.

Parol testimony may be given of a written instrument, upon an indictment for stealing such instrument, notwithstanding it is proved to be in existence and out of the *actual* possession of the defendant; for the possession of

of the holder is constructively the possession of the defendant.

As in the *KING, v. AICKLES, Old-Bailey, January 1784*, on an indictment for larceny, in feloniously stealing a bill of exchange.

Among other facts it appeared in evidence, that the bill charged to have been stolen, had been seen a few days before the trial in a state of negotiation, in the hands of a Mr. *Smith*, and that a *subpœna duces tecum* had been served upon him; but he did not appear, nor was the bill produced in evidence.

Silvester and *Fielding* for the prisoner, submitted that the bill ought to have been produced in evidence. The bill is proved to be in existence, and it is incumbent on the prosecutor to produce it. He might have taken proper measures for this purpose before he had proceeded to trial. If the bill had been lost or destroyed, parol testimony might perhaps have been admissible, but it is a clear and settled principle of law, that parol testimony cannot be given of any existing written instrument.

Garrow, for the crown, answered. It is proved, that the bill is in the hands of Mr. *Smith*, who has been served with a *subpœna* to produce it; and as he has refused to comply, parol testimony may be given of its contents. If it had been in the prisoner's possession, the next best evidence to the bill itself would have been admissible; for as a prisoner cannot be compelled, or even legally required to produce any evidence which may operate against himself, the next best evidence which it is in the power of a prosecutor to produce, is always admitted; and in the present case the possession of Mr. *Smith*, is to be considered as the possession of the prisoner. The principle therefore that parol testimony cannot be given of a written instrument, unless there is a strong presumption previously raised of its being lost or destroyed, is not universal and without exception.

On this point, this question was referred to the JUDGES—whether as the bill in question had not been produced, the parol testimony which had been given concerning it, was legally received?

The

The JUDGES were unanimously of opinion, that the *parol* testimony had been properly received; and the prisoner was sentenced to be transported. *Leach Cr. Ca.* 3 *Edit.* 330.

Rule the Sixth.

In a criminal prosecution, the solicitor for the crown may give *notice* to the defendant to produce a paper in his possession, and in case he neglects to produce it, he may give other evidence of its contents: and copies are admitted when the originals are in the adversary's hands; for the same reason as when originals are lost by accident; that is, because the party had not the original to produce.

So ruled, ATTORNEY-GENERAL, *v.* LE MERCHANT, *Nisi Prius*, Mich. 1772. Before EYRE, Baron.

This was an information on the *statute* 7 *Geo.* 1. *cap.* 21, *sec.* 9. for importing tea into *Guernsey*, without having first been laden and shipped in Great-Britain, &c.

The *attorney-general* offered to read letters concerning this tea, which had been sent to *Chanon*, a witness for the crown, which letters were proved to have come to the defendant's hands, under an order made by the lord chancellor, for the delivery up to him of all papers and letters, seized under a commission of bankrupt against *Chanon*, among which were these letters.

The solicitor of the excise had contrived to take copies of those letters, whilst they were in the hands of the clerk of the commission, and *notice* having been given to the defendant to produce the *original* letters, and that being refused, the *attorney-general* offered to read these copies.

The *counsel* for the defendant objected, principally that a defendant in a criminal case, was never bound to produce evidence against himself; that he was guilty of no crime in not producing them, and that the *attorney-general* had no right to call upon him to produce them, or to ask a single question concerning them, consequently no copies could be produced.

EYRE,

ERNE, B. admitted the evidence. He conceived that the principle on which copies were admitted was this, that they were the *best evidence* which the nature of the case could admit of, that *was in the power* of the party producing them to give; and not on any idea of any crime in the person in whose possession the originals were, refusing to produce them. And he thought there was no difference between criminal and civil cases.

The jury found for the crown.

The LORD CHIEF BARON, afterwards, delivering the opinion of the court, on a motion for a new trial, grounded on the above point, said, the question now is, whether the admitting of these copies in evidence, was proper or not? if they were improperly admitted, there ought to be a new trial. If the copies of these letters were not evidence, the jury might have found otherwise. The question now is, whether that evidence was properly admitted or not? And that depends upon the exceptions which were taken on the motion for a new trial. *First*, it was objected, that copies of letters or papers, in the hand of the adversary, ought not to be read in criminal cases. *Secondly*, that supposing they ought to be admitted, yet in this particular instance the notice that was given was not sufficient.

As to the first objection, that copies are not admissible in any criminal case, because that would be to oblige a man to produce evidence against himself; the answer was, that the defendant's counsel have not produced any one case to shew any difference at all as to the rule of evidence in criminal and civil cases; therefore the rule in both cases is the same; that is, to have the best evidence that is in the power of the party to produce, which means, that if the original can possibly be had, it shall be required; but if that original be destroyed, or if it is in the hands of the opposite party, who will not produce it, then in a case of a deed, a counter one, or sometimes a copy of the deed, or a copy of the paper, is evidence to be admitted.

But it is said, that this does not hold in *criminal* cases, because the consequence of it would be, to compel a man to produce evidence against himself: for this purpose

pose the KING, *v.* PARNELL, in the king's bench, and *Brazier's* case in *Strange* 1210, were relied upon. Now, with respect to this, the rule is certainly true, and the cases that were cited to this purpose are unquestionably right, and law; but they do not apply to the present case.

The KING, *v.* PARNELL, was in *Hilary*, 22 *Geo.* 2. 1748. There had been an information against doctor *Parnell*, the defendant, who was vice chancellor of *Oxford*, for refusing to act upon a complaint against some scholars, and the motion was, the common motion for a rule to shew cause, why the attorney-general, and those authorized by him, should not inspect all the public books, archives, records, &c. in the custody of the proper officer, to take copies. The attorney-general, sir *Dudley Ryder*, narrowed his demand, and desired only to see the statutes of the university; but the court refused it, because it would be to compel the defendant to produce evidence against himself; for the court had granted this rule for the inspection, and the doctor had disobeyed it, he would then have been liable to an attachment.

Ante 347.

So in the KING, *v.* CORNELIUS, and others. Upon that rule, had they obeyed it, they would have been compelled to have produced evidence against themselves; and have been subject to an attachment if they had not. 2 *Str.* 1210, 1211. *Ante* 347.

But the defendant, *Le Merchant*, is not compellable to produce these letters against himself; for he is liable to no punishment at all if he does not, but is left to his entire liberty either to do it or not; the only consequence must be, that these copies, which must be sworn to be true copies, are read against him. If they are not true copies, he has it in his power to prove that by producing the originals.

It was likewise said in support of the motion, that the reason why copies are permitted to be evidence in common cases is, because the party who has them in his custody and does not produce them, is in some fault for not producing them; it is considered as a misbehaviour in him; and therefore in criminal cases, a man who does not produce them is in no fault at all; and for that reason

reason a copy is not admitted. But that is not the rule; it is not founded on any misbehaviour of the party; or considering him in fault; but the rule is this, the copies are admitted when the originals are in the adversaries hands; for the same reason as when the originals are lost by accident, that is, because the party has not the originals to produce; and no difference has ever been made between civil and criminal cases.

LAYER's case, *B. R. Mich. 1722, 9 Geo. 1.* high treason, is apposite. The charge was an overt-act, in publishing a treasonable paper in the county of Essex: a witness proved the prisoner did produce a paper, and shewed him only part of it doubled; and then put it in his pocket; he remembered some lines of it, this was parol evidence of the contents of the paper, the purport of which was, to excite the nation to an insurrection, and to shake off the miseries and calamities they were under from the ministry. In that case no objection was made by the counsel Mr. *Hungerford* and Mr. *Kettleby*; they seemed to say, that the whole ought to be produced; that it was only a part, and therefore took off the force of the evidence; they did not object to that man's giving parol evidence of the contents of a paper in the hands of the prisoner, and that in a case of high treason. And there YORKE, solicitor-general, said, "after this paper was produced the prisoner took it back, "put it into his pocket and kept it; therefore the paper "itself being in his custody, we were properly permitted to prove the contents of it by parol evidence." This is not contradicted by the court, and though it is only the saying of one counsel, yet not being contradicted; it is strong. *6 St. Tr. 229.*

Another objection has been made, that this notice is not sufficient. The answer is, there is no difference between the rule of evidence in civil and criminal cases. Then, if there be no such difference, the rule which has always been followed and allowed in civil cases is, that notice be given to the attorney or agent of the adverse party; now, in this case, without going minutely into the consideration, whether the notice was proved to the defendant himself and was good, here is unquestionable

notice to *Sayer*, who is the agent and solicitor to *Le Merchant*, into whose hands it appears that these letters had actually been delivered; and then there is likewise notice to *Davy*, who is the attorney for the defendant in this very cause, and no attempt was made, on the part of the defendant, to prove what was become of these letters, or that it was not in his power to produce them. 2 *Term. Rep.* 201. *Leach Cr. Ca.* 3 edit. 336. *S. P.*

In the *KING, v. WATSON*, and others, *Hilary* 28 *Geo.* 3. 1788. This point respecting notice is fully determined.

It was a rule to shew cause why an information should not be granted against the defendant.

Bearcroft, Partridge, and Graham, in shewing cause against the rule, among other things said, that if the court should give leave to file an information, it would be impossible that the prosecutor could succeed at the trial; for he had no means of procuring the original order on which to frame an information, the tenor of which must be stated, because the corporation are not bound to criminate themselves by the production of it.

BULLER, J. It has been solemnly determined (in *Le Merchant's* case) that in a criminal prosecution, you may give notice to the defendant to produce a paper in his possession, and in case he neglects to produce it, you may give other evidence of it. 2 *Term. Rep.* 201.

So in the *KING, v. colonel GORDON*, *Old-Bailey, September sessions*, 1784, indicted for the murder of lieutenant colonel *Thomas*, in a duel. The letter from colonel *Gordon* containing the challenge, was carried by his servant and delivered to colonel *Thomas*. The servant of colonel *Thomas* brought a letter in answer back, and delivered it to colonel *Gordon's* servant; but it did not appear that the letter was in *fact* ever delivered to colonel *Gordon* himself.

EYRE, B. admitted an attested copy of it to be read against the prisoner, and left it with the jury as legal evidence, if they were of opinion that the original had ever reached the prisoner's hands.

HOTHAM, B. concurred, but,

GOULD,

GOULD, J. thought that positive proof ought to be given that the original had come into the prisoner's possession; and cited *Francis's case*. 6 St. Tr. 58.

In *GATES, qui tam, v. WINTER, Easter 29 Geo. 3.* the point respecting notice to produce evidence was again determined. Action to recover a penalty on the post-horse act. At the trial, before GOULD, J. at *Maidstone* assizes, the plaintiff proved a notice to the defendant's attorney to produce the licence; but the defendant's counsel objected to that, as this was a popular action it must be considered as a criminal prosecution, in which cases it is necessary to give notice to the defendant himself to produce papers, &c. And the learned judge being himself of this opinion, nonsuited the plaintiff.

On a rule to shew cause why the nonsuit should not be set aside, the court without hearing argument, on the authority of *Le Merchant's case*, in which this very point is decided, made the rule absolute. 3 Term. Rep. 306.

Rule the Seventh.

It is a general rule, that whenever an original is of a public nature, and would be produced in evidence, an immediate sworn copy is evidence: unless where particular cause, such as an alteration or erasure in the original be shewn; or the parties consent.

As in *LYNCH, v. CLARKE, Hilary, 8 Will. 3. B. R.* HOLT, C. J. said, that a copy of a fine or recovery is good evidence, so it be sworn to be a true copy, and examined and compared with the original. 3 Salk. 154.

And whenever an original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence. As the copy of a bargain and sale. Or a deed enrolled of a church register. But where an original is of a private nature, a copy is not evidence, unless the original is lost or burned. 3 Salk. 154.

And in *HOE, v. NELTHROPE, Hil. 8 Will. 3. B. R.* HOLT, C. J. held, that the copy of a probate of a will is good evidence, where the will itself is of chattles; for there the probate is an original, taken by authority, and

Dougl. 572. *Inf. et.* 503. Vide *Stranger* 645. And *Mumby, v. Thornhill*.

The principle therefore seems to be, as *LYNCH, v. CLARKE*, by Lord Holt, that an original is of a public nature, and would if produced, an immediate answer will be given. 3 *Salk.* 154. *Ans.* 355, 356.

So in *JONES, v. RANDALL*, *Hilary*, 14. Action upon a wager, whether a decree of chancery would, or would not, be reverse of lords. Verdict for the plaintiff.

Upon a rule to shew cause why there should be a new trial, one of the objections was, that reversal only, and not the minute book is produced.

LORD MANSFIELD. The minutes of the solemn judgment itself. Not a word of the journals: for the inconvenience would be, that the journals of the house of lords are to be produced over the kingdom. Formerly a doubt was made whether the minutes of the house of commons were admissible, because it is not a court of record. The journals of the house of lords, have always been admitted, even in criminal cases. *Cowp.* 17.

In the *KING, v. SMITH*, *Mich.* 5 *Geo.* 1. The plaintiff moved to produce an examination on a court doubting, it was adjourned.

The CHIEF JUSTICE afterwards delivered his opinion, where things are evidence in themselves, as books, we make no rule to produce them; but the parties may have copies, which copies are evidence; but this examination is not evidence of proving the hand of the party; and so it is not evidence, and therefore a copy of the examination, and the court must have the original. If the party concludes, the party make the rule to produce (not *prod. producat*) the examination, and give the party a copy in the mean time. 126.

In *BROCAS, v. the MAYOR, and aldermen*, *Easter*, 6 *Geo.* 1. The plaintiff moved to

of a public nature. Otherwise, where the will is of things in the *reality*, because in such case the ecclesiastical courts have no authority to take probates; therefore such probate is but a copy, and a copy of it is no more than the copy of a copy. 3 *Salk.* 154. 1 *Lord Raym.* 154. *S. C.*

So in *MAN, v. CARY, Pasch. 9 Will. 3.* The question was, whether the copy of a bank note, remaining upon the file in the bank of England, was good evidence or not? and the justices of the common pleas held, that it was; for that it was like the copy of an enrollment of a parish register, the bank being a public body, established by act of parliament, for public purposes. 3 *Salk.* 155.

In the *KING, v. lord GEORGE GORDON, Hil. 20 Geo. 3.* at bar, for high treason. Sworn copies of certain entries in the journals of the house of commons, were produced on the part of the crown, and read in evidence, without being objected to. *Dough.* 593. *MS.*

In the case of the *EAST INDIA COMPANY, Mich. 12 Geo. 3.* On a motion of *Dunning*, to shew cause why the company should not permit their original transfer-books to be produced, on the ground that copies from them could not be read. He said, there had been many nonsuits for want of producing the original journals of the house of commons, copies not being admissible. But the court denied that rule to be law, as stated, and mentioned several instances where copies of matters, not of record, are admissible, as copies of *court rolls*, of *parish registers*, &c. And,

Lord MANSFIELD expressly said, that copies of the journals are evidence, and were admitted on a trial at bar, and cited Sir WATKYN WILLIAM WYNNE, *v. MIDDLETON*, the sheriff of Derbyshire, on a false return.

The COURT added, that the reason *ab inconvenienti*, in holding it not necessary to produce records, applied with still greater force to such public books as the transfer books of the *East India Company*, for the utmost confusion would arise, if they could be transported to any, the most distant part of the kingdom, whenever their contents should be thought material on the trial of a cause.

Dough.

Dougl. 572. *Irisb* ed. 593. Vide *Skelling, v. Farmer*, 1 *Stran.* 646. And *Murray, v. Thornhill*, 2 *Stran.* 717.

The principle therefore seems to be, as laid down in *LYNCH, v. CLARKE*, by lord HOLT, that "whenever "an original is of a public nature, and would be evidence "if produced, an immediate sworn copy will be evidence." 3 *Salk.* 154. *Ante* 355, 356.

So in *JONES, v. RANDALL, Hilary, 14 Geo. 3. B. R.* Action upon a wager, whether a decree of the court of chancery would, or would not, be reversed in the house of lords. Verdict for the plaintiff.

Upon a rule to shew cause why there should not be a new trial, one of the objections was, that a copy of the reversal only, and not the minute book itself was produced.

LORD MANSFIELD. The minutes of the judgment are the solemn judgment itself. Not a word is added upon the journals: for the inconvenience would be endless if the journals of the house of lords are to be carried all over the kingdom. Formerly a doubt was entertained, whether the minutes of the house of commons were admissible, because it is not a court of record; but the journals of the house of lords, have always been admitted, even in criminal cases. *Cowp.* 17.

In the *KING, v. SMITH, Mich. 5 Geo. 1.* A rule was moved to produce an examination on a trial, and the court doubting, it was adjourned.

The CHIEF JUSTICE afterwards delivered their opinion, where things are evidence in themselves, as corporation books, we make no rule to produce them; but only that the parties may have copies, which copies are evidence; but this examination is not evidence of itself, without proving the hand of the party; and so it is of warrants and affidavits, and therefore a copy of them is no evidence, and the court must have the original, for nothing else concludes, the party make the rule that the justice *produci facit* (not *prod producat*) the examination at the trial, and give the party a copy in the mean time. 1 *Str.* 126.

In *BROCAS, v. the MAYOR, and aldermen of London, Easter, 6 Geo. 1.* The plaintiff moved that he might have

have a copy of the poll, and that sir *John Ward*, who as mayor, presided at the election, might produce the original at the trial.

Chefbire, serjeant, cited two cases, and produced the rules where the copy of the poll was ordered to be given, and the original to be produced. 12 *Ann.* sir *Peter Delme's* case, and *Trinity*, 4 *Geo.* 1, *Parminter's* case.

Strange, contra. As to a copy, they have already; and as to producing the original, it is an extraordinary attempt, because no use can be made of the original, but what can be made of the copy. He cited the *King, v. Smith* (vide *last case*) in which the court declared, that where things are evidence of themselves, &c. &c. and so it was held in the *Company of Gunsmiths, v. Turville*, *Mich.* 4 *Geo.* 1.

As to *Delme's* case it was made without any affidavit, which intimates there was a *consent* in it. And in *Parminter's* case, there was suspicion of an alteration in the poll.

PRATT, C. J. The *original* is never ordered to be produced where the *copy* is evidence, without such a particular foundation as has been mentioned. It was denied in sir *Gilbert Heathcote's* case. In the case of *Delme* there was a consent.

EYRE, J. In the case of *Marlborough* the original was produced, but it was upon an affidavit of *rafure*.

FORTESCUE, J. The poll is either a public thing like corporation books, or it is only in the nature of the officers or on private memorandum. If the first, then a copy is as much as you can ask, without some particular foundation. If the second, then you cannot have so much as a copy. 1 *Stra.* 307, 308.

And in *WARINER, v. JONES*, *Mich.* 7 *Geo.* 2. After the fire of *London*, power was given to the city to set out public markets, which was done and entered in their books. On motion, leave was granted to inspect the books and take copies. And the court compared it to the case of court rolls, which are considered as the evidence of the lord, but in the nature of *public books* for the benefit of the tenant. 2 *Stra.* 954, 955.

BULLER

BULLER assigns this reason for the admissibility of the last species of evidence. That the rolls of a court baron are evidence, for they are the public rolls, by which the inheritance of every tenant is preserved; and they are the rolls of the manor court, which was anciently a court of justice, relating to all property within the district.

And therefore a *copy* of a court roll *under the steward's hand*, is good evidence to prove the copyholder's estate. 1 *Keble* 567, 720. *Comb.* 138.

So an *examined copy* of the court roll is good evidence, if sworn to be a true one. *Comb.* 337.

For whenever the *original* is evidence, the *copy* is evidence. *Case of the Manor of Bray.* 12 *Mod.* 44.

And the *customary of a manor*, set forth upon parchment, found amongst the court rolls, and delivered from steward to steward, was received as evidence, though it could not properly be called a court roll. DENN, *on several demises of ANN GOODWIN, and others, v. SPRAY.* 1 *Term. Rep.* 466.

So the parish register of christenings, marriages, and burials. *MAY, v. MAY, at Bar.* 2 *Stra.* 1073. 1 *Salk.* 281. *The King, v. Dutcheffs of Kingston.* 11 *St. Tr.* 250.

In the *KING, v. MOTHERSELL, Easter, 4 Geo. 1. B. B.* it was ruled, that the corporation books are generally permitted to be given in evidence, when they have been publicly kept, and the entries made by the proper officer. 1 *Stra.* 93.

Rule the Eighth.

But papers relative to proceedings in corporations, though of ancient dates are not evidence, unless they be also corporate acts.

As in the *KING, v. GWYN, Mayor of Christ-church, Mich. 7 Geo. 1.*

On a trial at bar the question was, whether A. B. at the time he did a corporate act, was an out burges or not. And to prove he was, the defendant, who had a rule for copies, produced a copy of a letter fifty years old, and found in one of the corporation chests, wherein

A. B.

A. B. is mentioned to be of another place, but the court refused to hear it read, because not a corporate act within the rule, so that a copy of it is not evidence, but the original ought to be produced. 1 *Str.* 401. *

CHAPTER II.

Of PAROL EVIDENCE, and how far HEARSAY may be admitted at common law, and by virtue of the statutes.

Rule the First.

No evidence can be received against a prisoner but in his presence: and therefore it is agreed, that what a stranger has been heard to say, is in strictness no manner of evidence, either *for* or *against* the prisoner. 2 *Hawk. P. C. ca.* 46.

The reasons assigned as the grounds of this rule are, because such evidence is not upon *oath*: and also because the party, who would be affected by such evidence, had no opportunity of cross examination. And these rules are strongly illustrated in various cases. See the *KING, v. PAINE*: *Ante* 14. *The King, v. Woodcock*. *Ante* 297. *The King, v. Dingler*. *Ante* 299. *The King, v. the Inhabitants of Eriswell*. *Ante* 301.

Rule the Second.

But *hearsay* evidence may be made use of by way of inducement or illustration of what is properly evidence. *Ibid.* and *Bull. N. P.* 294.

* NOTE.—As all the rules and cases in this chapter are connected with and illustrative of the first rule, it was thought best to connect them under one chapter, though several of them clearly belong to Book 3. which treats of *Written Evidence*.

Rule

Verbal confessions, and what a prisoner has been heard to *say* at any time in conversation, or by observation, relative to the matter in issue, may be given in evidence *against* him: 2 *Hawk. P. C. ca.* 46. Vide *chap. CONFESSION ante.* 8, 37, 268, 282. 2 *St. Tr. (Harg.)* 1005.

And therefore words spoken at any time may be given in evidence to support an overt act of high treason, though not treason in themselves. 1 *Hale, P. C.* 116. *Foff.* 202. 1 *Hale, P. C.* 114.

Rule the Fourth.

But though the declarations of a prisoner respecting facts, or which apply to the particular case charged, though the *intent* should make part of the charge, may be given *against* him, they can not *for* him.

Therefore a witness for this purpose can not be called in the prisoner's defence: but he may *cross-examine* any of the witnesses on the part of the prosecution as to any thing they may have heard him say relating to the fact he is charged with. *Bull. N. P.* 294.

So in the *KING v. JOHN HAMPDEN*, *Hilary*, 35 *Car.* 2: *Ban. Reg. anno* 1683. indicted for a misdemeanor, in confederating to raise an insurrection.

Williams, of counsel for the defendant, interrogated a witness to his disposition, and whether he was a seditious and turbulent man, or a studeous and retired man.

JEEFERIES, C. J. said, addressing the counsel—"Will that be any evidence? will Mr. *Hampden's* declaration be any evidence, he being a person *accused*? do you think he would tell the witness or any body else?"

Doctor *Lupce*, the witness, answered, that the two years he lived with Mr. *Hampden* he kept him company in his studies, and all that time he found he had no other inclinations but for study and knowledge, and his inclinations were very virtuous. He always observed in his discourse a great submission and respect that he had for the laws of the nation and his prince, and to that degree he was a faithful subject to the king, and that once he

told him, in discoursing with him on the late popish plot, that he was ready to sacrifice his life and fortune for the king's service.

The witness was then asked, what discourse he had with Mr. *Hampden* about the plot.

Sir GEORGE JEFFERIES, C. J. on hearing this, again addressed himself to the defendant's counsel thus—"Will
" that be any evidence, do you think, he being a person
" accused? do you think he would tell the doctor, or
" any body else, that he was guilty, when he was like to
" be questioned? that would have been a wise business
" indeed! You say he was a very studeous man, and a
" learned man; truly if he had done that, he had be-
" stowed his learning to very little purpose."

Williams answered, that he would ask this—Whether in discoursing with the defendants upon the discovery of the late conspiracy, and the danger of the times, he would have advised him to have gone, and whether Mr. *Hampden* did not answer, "he would not, he was an innocent man, and would not stir."

The CHIEF JUSTICE replied, Well; ask him what you will: but his declaration of his own innocence can *not* be evidence. 3 *St. Tr.* 843.

This was on a misdemeanor. In a case of high treason, a similar point was debated at great length, and produced a decision which will probably stand unshaken, and indeed, unquestioned in future. This was—

The KING *v.* HARDY, tried for high treason in compassing the death of the King, *Old Bailey Sessions*, 34 *Geo.* 3. anno 1794.

Erykine, of counsel for the prisoner, put this question to Mr. *Daniel Stewart*, a witness—"You stated in your former examination your personal acquaintance with the prisoner at the bar, and your transactions with him before. Did you ever hear him state what his plan of reform was? The witness answered, he always stated it to be the *Duke of Richmond's* plan, universal suffrage, and annual parliaments." Q. "Was that said to you publicly or in privacy of confidence?" A. It was said publicly, and he sold me some copies of the *Duke of Richmond's* letter."

The

The *Attorney General*, Sir ROBERT SCOTT objected to the evidence.

Erskine, on the authority of the KING v. HOLT, *Ban. Reg.* 39 Geo. 3. anno 1793, said he was inclined to think he should succeed in shewing the admissibility of the evidence offered from what fell from the judges of the King's Bench, (two of whom were now present) when it was discussed how far a paper that had been published in the year 1780, written by some persons of rank, should have been received in evidence by Mr. Justice *Wilson*, who tried an individual, in 1793, for a libel. The court supported the rejection of it. The learned judge rejected it upon this principle: that the defendant in that case was charged with an *act*, which *act* was the publication of a libel, and that although the *act* of parliament directs in fact, that the trial upon a libel like the trial upon any other case, proceeds by the judge's giving his opinion to the jury in matter of law, still it does not require that there should be any evidence upon the subject shewing the *intention*. And upon this ground they say—you may *rebut* evidence which fastens any thing that is wrong upon you, undoubtedly; but because a person has published a libel, supposing it to be one, in the year 1780, that will be no answer to your publishing a libel in the year 1793. It may be matter in mitigation of punishment; but, said the COURT, it is not strictly evidence, because it does not go to negative the *gist* of the indictment; for supposing it to have been received by the judge, he could not have told the jury, if he thought, it point of law, the publication was a libel, that the publication of the same libel, by any other person, at any other time, was a shield against the criminal law attaching upon the defendant in that case, and upon that ground Mr. Justice *Wilson* decided it, and, as the court of King's Bench determined, rightly decided it, 5 *Term. Rep.* 436.

On the authority of the above case, *Erskine* considered himself in possession of the opinion of the court in the striking difference between the case now in agitation, and a case where a man is charged with a *fact*, which *fact*, if it be done, the criminal *intention* which arises from

the commission of the criminal act, carries with it a certain legal inference, which legal inference being once established, it does not become a matter of fact for the prisoner to endeavour to rebut.

Leaving out of consideration the act of parliament respecting libels, he said, on the authority of Lord MANSFIELD, in the *King v. Woodfall*, that wherever the fact does constitute the crime, but that the fact is either in itself wholly indifferent, or it is not indifferent, but criminal; if it be criminal short of the charge that is made upon the party, that there the *intention* is not matter of law, but that it is matter of fact, and that the party has a right to prove his *intention* in every way by which the intention of a man can be safely or reasonably collected. To apply that doctrine to the case mentioned, he stated, that though the defendant called no witnesses to rebut the criminal inference, yet Lord MANSFIELD said—if it be upon the libel, he may arrest the judgment upon the record, for the *fact of publication* is the crime that is imputed to him; and if, when it comes before the court, that publication turns out to be no libel, the defendant have no judgment pronounced upon him. 5 Burr. 261.

Now what is the present case? The prisoner is charged with the overt acts, but he is not charged with the commission of those acts, as *substantive acts*, but he is charged with having *in his mind* the wicked and detestable purpose of aiming at the destruction of the King, to put down and bring the King to death, and that in the fulfilment of that most detestable imagination he did the specific acts charged upon the record. Here then the *intention* of the mind is the question which the jury have to try. Then that being the case, let us see whether the *declarations* of a prisoner, charged with a wicked and evil *intention*, can not be given in evidence for him. *Ante* 320.

He then cited—*First*, the case of Lord GEORGE GORDON, which he considered as the most important, because the prisoner was not charged with *compassing* the death of the King, but with an *act*—with levying war, and quoted Lord MANSFIELD's words to shew that the *intent* of the prisoner was the object for the jury to decide

side upon. In that case the counsel for the prisoner were permitted to ask of the Rev. Mr. *Middleton* this question: "Did you at any of those numerous meetings of this protestant association ever hear Lord *George Gordon*, in his public speeches in that association, make use of any expressions which shewed any thing disloyal or unconstitutional in him?" "Not in the least, the very reverse is my opinion." He then stated several other questions of the same kind put by Mr. *Kenyon*, who acted with him as counsel for lord *George*, and observed, that neither the attorney or solicitor general, nor the judges, lord *MANSFIELD* and Mr. Justice *BULLER*, made the smallest objection.

Secondly, Lord *RUSSEL*'s case, 35 *Car. 2.* for compassing the King's death. In his defence, lord *RUSSEL* called many witnesses to speak to his affection, and said himself to doctor *Burnet*, "If you please to give some account of my conversation." Doctor *Burnet* says: "I have had the honour to be known to my lord *Russel* several years, and he hath declared himself with much confidence to me, and he always, upon all occasions, expressed himself against all risings." Now this is not character, to say that lord *Russel* was a quiet peaceable man; no, this is evidence of conversation, therefore it is not that you are to raise a probability upon the subject by the general nature of a man's character, or what you think of him; but it shall be allowed to witnesses to say what the person trying has expressed, because it raises an intrinsic improbability of his being guilty of the crime imputed to him. He then quoted other questions of the same tendency permitted to be put by the court. 3 *St. Tr.* 706.

Thirdly, *THOMAS ROSEWELL*'s case, 36 *Car. 2. B. R.* A dissenting minister indicted for preaching a treasonable sermon. Besides giving evidence directly denying the charge, he called several of his congregation to prove that he generally kept the thirtieth of January as a fast. Mr. *Rosewell* says, "Did you ever hear that I should say any thing ill of the King and government?" Mr. *Strong*. "No, never." Mr. *Rosewell* asks *Atkinson*, another witness, "That which I call you for now, sir, is,
" to

“ to testify what you heard about the thirtieth of January about me, as a day of fasting and prayer for the King and all that are in authority.” *Atkinson*. “ My lord, he kept that day, the thirtieth of January, as a day of fasting and prayer, and he preached that text on the 1 *Timothy*, ca. 2. v. 1. “ Pray for the king and all in authority.” That was not the sermon for which he was indicted, but in order to shew it was not probable he should have preached such a sermon as he was charged with, he shews that at a recent time he had preached differently; and certainly it is fair evidence. A man is not a republican on Monday, a monarchy man on Tuesday, and a republican again on Wednesday: his sentiments do not change in a moment.

Mr. *Atkinson* proceeds in his evidence: “ and then he did assert that kingly government was most agreeable to the word of God, and the constitution of the government of England.” It is material to know who tried this cause.—Lord Chief Justice *JEFFERIES* tried this cause, and he received the evidence. 3 *St. Tr.* 997.

Fourth. *CORNISHE*’s case, 1 *Jac.* 2. anno 1615. He was indicted for compassing the king’s death. The overt act was conspiring with lord *Russel* and the duke of Monmouth to levy war. He called several witnesses to testify his loyalty; and though the witnesses were discouraged they were permitted to swear that they thought him loyal, and that he often drank the king’s health. Lord chief justice *JONES* was the judge, and Sir *Robert Sawyer* and Mr. *Finch*, who had prosecuted lord *Russel* and *Algernon Sidney*, were still attorney and solicitor generals. When were those cases? At the very worst times in this country, when judges were, what none of the present judges can, in the nature of things be, men dependant on the crown. 4 *St. Tr.* 130.

Fifth. *JOHN ASHTON*’s case. 2 *William and Mary*. He was indicted on the second of *Will. and Mary* for a conspiracy to dethrone king *William*, and compass his death. The counsel for the crown, in opening, charged the prisoner with an intention to introduce popery; in answer to

to which he gives evidence of his zeal for the protestant religion and aversion to popery. This trial was before Lord Chief Justice HOLT, and was concluded on the part of the crown by Serjeants *Thompson* and *Tremain*. 4 *St. Tr.* 455.

Sixth. SIR JOHN FRIEND's case, 8 *Will.* 3. He was indicted for compassing the death of the king, and promoting an invasion and rebellion within the realm. In his defence he called many witnesses, not to his *character*, but to *declarations*. He says to the witnesses, "When you have been in my company, and they have been speaking of the government, what have I said or done?" 4 *St. Tr.* 599.

Is that any thing like *character*? Suppose at this moment I should turn about to Mr. *Steuart*, and say, "When you have been speaking of government with Mr. *Hardy*, what has he said or done?"

Seventh. PETER COOK's case. *Old Bailey Sess.* 8 *Will.* 3. He was indicted for the same treason of which Sir *John Friend* was convicted, and the prisoner in his defence goes exactly to the same kind of evidence adduced upon the former trial. Mr. Serjeant *Darnel*, who was counsel for the prisoner, says, "What have you heard the prisoner say about our fleet or army?"

Now, says *Erskine*, what has that to do with his *character*? It was to negative the probability of his wishing to bring to destruction our army and navy, and to bring in a foreign prince who had been expelled from this country for not recollecting what right belonged to the people of this country. He says, "I have heard him wish prosperity and success to our fleet."

Eighth. The next is the case of DEMAREE and PURCHASE, 1710. He was a badge waterman to *Queen ANNE*. He was tried for pulling down a meeting-house, which *Foster* says, "was held to be a constructive levying of war *," and which was not put
as

* NOTE—The treason charged on *Damaree* was rising to the amount of five hundred persons with an intent and proceeding to pull down *all* meeting-houses, that constituted the crime. *Foster's Cr. Law*, 208, 213, 216. 8 *St. Tr.* 218.

as an overt act of compassing the queen's death. The law says, a man so acting is guilty of high treason; but a man may say, "I did not *intend* to levy war." Here is an ambiguous thing, a thing which if it be said not to be legal, is totally different from the charge in the indictment. It is the attorney general's duty to put a different construction on it, and I am seeking to prove that probability by the same rules evidence ever adopted, not in a case like this, where the *intention* constitutes the crime. The intention is not any thing that you can argue into intention, but must be deduced from acts—then surely I have a right to ask, whether the prisoner meant to pursue the *Duke of Richmond's* plan, and to leave it to the jury to infer, whether he meant to commit the crimes imputed by this indictment. Surely such questions go strongly to negative that *intention* which constitutes the essence of this crime. 8 *St. Tr.* 267.

In *DAMAREE's* case, upon the examination of *Whitaker*, the counsel for *Damaree* asked, "was he disaffected to the queen and government?" The witness answers, "I believe no man better affected. At any times when there have been public rejoicings for any victories how has he behaved himself?" Now the first question is as to *character*, as affected or disaffected, collecting it generally, but the second is to what he has said when conversed with, how he has *declared* himself; that is, *not* to character.

The difference between evidence to *character* and this species of evidence is this—you can not, when examining to character, ask what has *A. B. C.* told you about this man's character. No, but what is the general opinion concerning him. But this species of evidence is totally foreign to that, as it is a declaration of the prisoner to an individual witness on a particular occasion, and connected with the subjects under examination. 8 *St. Tr.* 218.

Tenth. The KING v. FRANCIS FRANCIA. *Old Bailey January Sessions*, 1716. 3 *Geo. 1.* He was indicted for high treason in corresponding with the Pretender. In his defence, *Hungerford*, one of his counsel, says to a witness, "What do you know of the prisoner's behaviour?"

haviour?" The answer was, "It was a great surprise to me, when I heard that he was taken up: for we often used to drink a health to king George."

In FITZ-HARRIS's case, *Easter*, 33 *Car.* 2. *B. R.* for treason, the prisoner asks a witness, "whether he thinks the act with which he (the prisoner) is charged was done with a treasonable intention."—That is not objected to, though *Jefferies* conducted the prosecution. 3 *St. Tr.* 224.

Erskine concluded thus: Supposing the authorities cited out of the question, or that they had not existed, but that the argument stands upon the *principles* of the criminal law of England, when the nature of the case before the court is considered; when anomaly is attended to; when it is recollected, that although the statute of 25 *Edw.* 3. does not make the overt act charged upon the record treason, yet when the overt act is admitted to be charged upon the record, *every thing* which creates a *probability* to the *contrary* to *negative* the *intention* must be received; provided it be a rational principle of evidence, provided it be of a sort that when one looks round it one sees nothing by which justice can be surprised or endangered. What is pressed has been indulged to others in similar proceedings. His wish was this, that the law of the land should be administered fairly and impartially. That one man should have what another has had, but no more, and no less.—"I conceive," continued *Erskine*, "that when the attorney general takes into consideration the cases cited and the principle on which they are grounded, he will think this evidence ought to be admitted. It is a matter of importance, not only as it concerns the administration of justice in general, but as it concerns the case of the prisoner." *Vide Hardy's Trial, by Gurney, vol. iv. p. 28 to 45, inclusive.*

Gibbs, same side, submitted that the evidence offered is admissible. The law that arises out of the case is exhausted; but it seems a plain principle, in a case of this sort, that the declaration of the prisoner, explaining the overt act, the tendency of which overt act is the point for the jury to determine, must be admissible evidence.

It is laid down in *Hale*, and in many cases, that an overt act, indifferent in its nature, may yet be explained by an overt act committed, tending to the purpose conceived by the prisoner of destroying the king; for instance, in *Croftagan's* case, the act charged, the coming into England, was in itself an indifferent act, which became an overt act of compassing the king's death, because the *intent* of his coming into England was explained by words, spoken elsewhere; and so in many other cases words spoken by a man, not only at the time of the overt act, but before that time are admissible; for there is no limitation of time within which words spoken by a prisoner may not be given in evidence to explain the nature of an overt act, charged to be an overt act in the prosecution of his design of compassing the king's death. Vide *Foster's Crown Law*, 202, 203. 1 *Hale*, P. Cr. 116. *Keil*. 13. *Cro. Car.* 332.

Now if the crown may give evidence of the whole of a man's life, for the purpose of explaining an indifferent act, and giving it a criminal completion, surely it follows, upon the principle of administering equal justice, that whatever he said upon the same subject, tending to prove a *different intention*, an innocent intention, it should be competent in him to give in evidence. The distinction is this: if that which is charged upon a man to be an act, if it be a thing done, you can not in any case give in evidence that the prisoner has denied that he did the thing. The crown in that case may give evidence that he did at any time admit that he committed the act, the prisoner can not answer that by shewing that at another time he said he had not done it, though you may ask whether he had not held some other conversation which explained the tendency of that. We have it not in question now, whether he did commit the overt act stated in the indictment, but whether in committing the act he had, or had not, the original design.

EYRE, C. B. Here the *design* is *part of the overt act*; it is described as part of the overt act.

GIBBS. The distinction is this—there is before the jury both the fact and the design as to deposing the king, namely, the fact of consenting to hold a convention, and the

the design with which it was consented to be held; but we are now about to shew *what the design was* to exculpate the prisoner from any criminal intention. It is admitted we could not go into evidence of what the prisoner had said at any time of his life for the purpose of shewing he had not consented to hold this convention, because that is a fact; but in order to shew that that convention was consented to be held, not with the design which the crown imputes, but with an innocent design, we may go into evidence of what the prisoner at *other times* declared, inasmuch as the crown has gone into all that which the prisoner at any part of his life has declared touching the fact; and not only that, but into evidence of what any member of the London Corresponding Society, any member of the Constitutional Society, or any member of any societies corresponding with those societies have said. As the crown is permitted to go into evidence of what any one of those people have said, in order to prove that the ultimate design was to depose the king; we only ask, in answer to that, that we may be permitted to go into declarations of the prisoner of that which can be only found in his own mind; not that he *did not do* the act imputed to him, but that the *design* with which he *did* that act was different from that which the crown imputed to him.

He then put as in point the case of *murder*. Suppose it plainly proved that the prisoner did kill the deceased, and the question is, whether it is murder or man-slaughter that will turn upon the *intent*. In that case it is the constant uniform practice to receive evidence of the declarations of the prisoner of his good-will and friendship to the deceased; and the rule is not confined to declarations immediately upon committing the act, but to declarations of former times. Why are these declarations received? The act of giving the blow is admitted. So here the calling of a convention is admitted; the declarations are received for this purpose, to shew what *the mind* of the man was; what his *intent* must have been, whether he gave the blow to produce death or not. Then with what view do we offer this evidence? To shew his *design*, whether it was the design the attorney

general imputes, or an innocent one. We offer this evidence in order to shew that the object of this convention was different from that which the attorney general states, in the same way as the evidence of good will to the deceased is admitted in a case where the question is, whether the crime is murder or man-slaughter. *Hardy's Trial, by Gurney, vol. iv. 46, 47, 48.*

Attorney General, Sir Robert Scott, now Lord ELDON, Chancellor of ENGLAND, said, he made the objection to the question being put to the prisoner upon a public principle, and did not trouble the court from a consciousness that he was right; he could not sacrifice to his inclinations what appeared to his mind to be a great principle in judicature, adopted and acted upon for the benefit of the public, and therefore for the benefit of every individual who formed a part of it.

He agreed that the questions, with respect to the *effect* of evidence and the *admissibility* of evidence, are perfectly distinct. In the case before the court, it had been given in evidence that Mr. Tooke, whose name occurs in the indictment, at the Crown and Anchor tavern, upon the second of May, 1792, spoke with great respect of the hereditary nobility of the country; and spoke also with respect of the majesty of the king. Why is that evidence? Because it was a transaction of the two societies met in the course of the business which they had been doing; and also, because it came out upon the cross-examination, a circumstance materially to be attended to. So with respect to the prisoner at the bar, there has been *evidence given* of the effect of the papers produced that the language he was to hold was to be such language as prudence would permit; that he received papers which were not communicated to the society; and one private letter in which a proposition is stated, that monarchy is to be ripped up by the roots: that in the answer to that letter it is stated to those who held that conversation with him, "Do not talk about monarchy, let your language be confined to universal suffrage and annual parliaments, and all the rest of your object will follow." There may be a great number of these circumstances given in evidence, but then the question will follow—
whether

whether the declarations the man made is given under such *circumstances*, at such *time*, and in course of a conversation, which makes that declaration evidence.

On Lord GEORGE GORDON's case, he observed that the principle upon which the declarations of the defendant were received in evidence was, that the declarations were really a *fact*; for whatever declaration *accompanies* the transaction, whatever declaration is a *part* of the transaction that is done, is part of the fact that is doing; and upon that ground the declarations were admitted. It does not weaken the observation that evidence was given that lord *George Gordon* went to a magistrate, or some other person, whilst the mob was over-ruling the civil power; for any conversation that was held by lord *George Gordon*, during the existence of the riots, and with reference to them, he being a party in them was a declaration made *at the time* and upon all the principles of evidence was therefore *connected* with the transaction.

CROHAGAN's case is as distinguishable from the present evidence upon the same principle. The object was to prove the view with which the man came into England. He declared "he would come into England to kill the king." He did come into England. His making the declaration, though it would be punishable in another way, yet still would not be high treason if he had not come into England; and upon the whole of the evidence, the coming into England made a part of the transaction with the declaration he had made. It was an overt act of high treason, because it was then understood to be a fact done.

What is the evidence in the case of ROSEWELL and others stated? First, he has not stated with respect to these trials who were the witnesses allowed to speak to these facts, or whether the circumstances were asked upon cross-examination. He has not stated whether witnesses were called to general character, and then gave in evidence these circumstances in explanation of the general character they had given. He has not stated whether the witnesses who spoke to those particular declarations were speaking to declarations which did or did not pass

pass in the course of the very transaction which these witnesses were called to prove.

He did not mean to contend that it may not be competent to state every word that *Hardy* ever said in the corresponding society—every word he said in his correspondence with other societies; every word that he ever said in the constitutional society; every word which it can be shewn, upon the evidence proposed, had a direct connection, or could be fairly connected with the transaction before the court: but he objects to the calling of a witness who was not a member of any of these societies, a witness who had already told the court that he knew but little of Mr. *Hardy*, and that he did not even know he was an associated member of a society; a witness called not to this question whether in the course of any transaction connected with the subject before the court, Mr. *Hardy* made a declaration that could be considered as a part of that transaction, but that he should be asked what were the declarations of Mr. *Hardy* at any time when he may have seen him without connection with the subject which is the matter of the present indictment. If this evidence be let in for a prisoner, it will probably lead to let in evidence against him. There may be cases in which, if this sort of evidence can be let in upon principle, may furnish a principle upon which evidence may be offered, which has not been attempted in this cause.

Solicitor General John Mitford (now lord REDSDALE, Chancellor of IRELAND), said he troubled the court for the purpose of stating the extent to which the principle might go. It was important to attend to the manner in which questions of this sort have been permitted to pass upon trials. They are often not attended to, often thought unimportant upon particular trials; and the question put in *Fitz-Harris's* case shews it, “whether the witness thought the act with which he was charged was done with a treasonable intent?”—which was the very question to be left to the jury. Now that question having been put without any objection to it shews, that in the course of trials of this nature things are frequently
passed

passed over, without objection, which ought to be objected to ; but, which shews that those employed for the crown, do not think that the general necessity of public justice requires that they should be raised. The question here appears to be raised simply upon grounds of the general necessity of public justice ; but the principles and rules of law, especially the law of evidence in criminal matters, ought to be attended to with a very considerable degree of care and caution, or it will be impossible to say to what length, upon the authority of what has passed in particular cases, the matter may be carried.

He conceived the rule of evidence to be, that a question which went to a particular fact, not relative to the charge of the very fact which was in question, never could in its nature be asked with a view to try the truth of the particular charge ; general character may be given in evidence, general conduct may be given in evidence, conduct being in effect part of character ; but in no case, where a man is trying for any act, can evidence be given of any particular act done by him at any particular time under similar circumstances, and the question which is now attempted to be put, appears to be of that nature. If this question can be put, why may not the prisoner give in evidence every letter which he has ever given to any person whatever upon political subjects, in which he may have stated his own objects in any way he thought proper, and perhaps with a view to this very prosecution ; if this is considered, the danger of the admission of such evidence is considerable, and is contrary to all the principles upon which courts have proceeded.

He considered the cases, cited by Mr. *Erskine*, except as far as inadvertence might have permitted questions to pass unnoticed, not to press hard on the present case.

In lord GEORGE GORDON's case, it did not appear that any one question was put, with respect to the words of lord *George Gordon* at any time, which did not, in effect, form part of his conduct in the very transaction which was in question. Like the cry of a mob, for instance in pulling down a house, the general cry of a mob is given in evidence against a prisoner, because it was part of the transaction at the time. NOTE—*This*

observation

observation is supported by the coalheavers case. Leach's Cr. Ca. 2 Edit. 61. 3 Edit. 76.

He then observed, that in the other cases the questions were upon the *cross examination*, not the original examination, which being denied by *Erskine*, he said he would advert to some of them:

First, CORNISH's case. What was it? the prisoner called several witnesses to testify his loyalty, and that he drank the king's health. Does that warrant the question that was going to be put to Mr. *Steuart*, with respect to Mr. *Hardy's* particular object, on a particular thing? for that is the nature of the question that was going to be put.

Second, sir JOHN FRIEND's case. The questions there put were evidence of his general conduct, with respect to the government of the country; and with respect to his views and intentions to that government. The questions there put must have been on a cross examination of a person who was called to give evidence of a plot. And the fact in sir *John Friend's* case was, that it was proved he was concerned in a plot. Is the guilt of a person with respect to a particular fact to be tried, by causing persons to say, that at a particular time he said, he would not be concerned in any such plot as was charged? would it be permitted on a trial for murder, to give in evidence that the prisoner said he would not commit a murder? and yet this is the evidence offered. The question must have been on cross examination.

Third, DAMAREE's case. It was asked how the prisoner behaved at any general rejoicings. Is that any thing more than evidence of general deportment?
Ante

Fourth, ROSEWELL's case. The evidence there, is in a great degree general deportment: though there was a degree of inaccuracy in permitting the question to be put exactly as it was put; but the question tended simply to this, whether his general deportment was that of a man loyal and attached to the government of the country, and nothing more. He concluded with saying, his object was, to prevent an improper precedent.
Ante

Bower,

Brewer, on the same side, urged, that the declarations of parties were evidence only, either in cases where they accompany the act at the time that they are made, or where they have been at different times, or under different circumstances, totally unconnected with that fact, which is the question under discussion in the court, in which cases they have always been received in the nature of facts, or rather as circumstances, by which the general conduct of the party is to be judged of; as being circumstances and being declarations given upon subjects to answer no particular purpose, and not connected with that which is the subject matter of discussion, at the time that the evidence is given.

The cases cited by *Erskine*, he insisted, confirmed the principle: for, in every case he had stated, the evidence received had been to shew the general conduct and character of the prisoner, in circumstances and occasions no way connected with the crime of which he was then accused; but as circumstances and declarations in situations from which the jury might collect the general character and conduct of the prisoner.

He allowed that the evidence in cases of murder, as stated by *Gibbs*, was admissible, but said that in a case of that kind it never was admitted to be said by the prisoner, that he had no intention to kill the deceased, and that such assertion should be received as evidence to explain the acts which were proved against the prisoner, upon the evidence given, and upon which the judgment of the court and jury are to be drawn. He then examined, critically, the several cases cited by *Erskine*, and concluded, with his opinion, that the evidence offered was of a different complexion, and such as he never recollected to have been offered in a court of justice.

EYRE, C. B. Nothing is so clear, as that all *declarations* which apply to *facts*, and even apply to the particular case that is charged, though the *intent* should make a part of that charge, are evidence *against* a prisoner, and are *not* evidence *for* him: because the presumption upon which *declarations* are evidence is, that no man would declare any thing *against* himself, unless it were true; but that every man, if he was in a difficulty, would

make declarations *for* himself. Those declarations, if offered as evidence, would be offered therefore upon no ground which intitled them to credit. That is the general rule. *Ante* .

But if the question be, as I really think it is in this case, what was the political speculative opinion which the prisoner entertained, touching a reform in parliament? *We all think*, that opinion may very well be learned and discovered, by the conversation which he has held at any time, or in any place.

If, as I have stated, the declaration was meant to apply to a disavowal of the particular charge made against this man, that declaration could not be received; as for instance, if he had said to some friend of his, when I planned the convention, I did not mean to use this convention to destroy the king and his government, but I did mean to get by means of this convention, the duke of *Richmond's* plan of reform, that would fall within the rule I first laid down; that would be a declaration, which being *for* him, he could not be admitted to make, though the law will allow a contrary declaration to have been given in evidence.

Erskine then put the question to Mr. *Steuart*, the witness, thus, "Did you, before the time of the convention being held, which is imputed to Mr. *Hardy*, ever hear from him what his objects were? whether he has at all mixed himself in that business?" which was admitted without objection, and then he was interrogated to *Hardy's* character, as to sincerity and truth. *Vide ca. Character. Ante b. 1. 320. Hardy's Tr. 4 vol. by Gurney, from 27 to 66.*

Rule the Fifth.

What a witness hath been heard to say, at another time may be given in evidence, in order either to invalidate or confirm the testimony which he gives in court. 2 *Hawk. P. Cr. ca. 46.*

So determined in the case of *LUCY LUTTERAL*, widow, execution, &c. *v. REYNELL, TUBBERVILL, and CORRY. Trinity, 29 Car. 2. B. R.*

This

This was an action of trespass, for that the defendants did, with force and arms, take away 4000*l.* of money numbered, &c. On the trial it appeared by the evidence of *William Maynard* that he was guilty, together with the defendants, but was left out of the declaration that he might be a witness for the plaintiff.

The Chief BARON ruled that this circumstance went not to his competency, but to his credit; and to support that, several witnesses were received and allowed to prove that he, at several times did discourse and declare the same things and to the same purpose that he had given in evidence. And the lord chief BARON said, that though *hearsay* was not allowed to be direct evidence, yet it might be made use of to this purpose, *viz.* to prove that *William Maynard* was constant to himself, whereby his testimony was corroborated. 1 *Mod.* 282. *Bull. N. P.* 294.

The above rule was however strongly contested on the trials for high treason before commissioners of *Oyer and Terminer* in Ireland, from the year 1795 to 1798, but the JUDGES constantly held that evidence may be admitted to prove the consistency of the testimony of a witness from the coincidence of facts or accounts given by him at different times of the same transaction.

As in LEARY's case, at a commission of *Oyer and Terminer*, December, 1795. 35 *Geo.* 3. at Dublin, before CHAMBERLAIN and FENUCANE, Justices, and GEORGE, B. The moral character of *James Lawler*, a witness for the crown having been impeached on cross-examination by the counsel for the prisoners, and also by witnesses who swore he did not deserve credit on his oath, giving evidence, in a court of Justice. *George Cowan* was called to prove that the witness in disclosing to him his knowledge of the treason charged in the indictment, told him almost word for word as he had deposed in court, on the trial depending, and on the trial of *James Weldon*, previously convicted of the same treason. *Ridgway's Rep. of Leary's Trial*, 88. *also M. S.*

In PATRICK FINNY's case, at a Commission of *Oyer and Terminer*, Dublin, January, 1798. 38 *Geo.* 3. before CHAMBERLAIN J. and SMITH, B. the same point came

in a stronger way before the court than on the preceding trials. *James O'Brien*, the principal witness for the crown, and who appeared as a person who had procured himself to be introduced into a society of United Irishmen, for the special purpose of giving evidence, underwent a strict cross-examination, in which several questions were put tending to shake his credit.

Townshend, of counsel for the crown, immediately, on the closing of the cross-examination, of course before any witness was produced by the prisoner to impeach the veracity of the witness, said, that with the permission of the court he would now examine lord *Portarlington*, and the object of producing his lordship was, that as an attempt had been made to impeach the credit of the witness, his lordship's testimony, that information which the witness had given to his lordship in a conversation of what was going on, was consistent with what he had sworn on the table.

Curran and *Mac Nally*, for the prisoner, objected to this species of evidence. They said, if a witness be impeached, it is competent to set him up and shew that the impeachment is not well founded. Every witness is impeached in some degree by a cross-examination, but it is not usual to hear evidence in support of a witness for the prosecution until the prisoner's case is gone through. If the prisoner's counsel examine witnesses to general character or to particular facts, then the witness for the crown, thus impeached, is intitled to rebut those facts, or call witnesses to support his general character; but can the counsel for the prosecution say, "This man's evidence is impeached, or seems to be impeached by the counsel for the prisoner, and therefore we think it necessary to support him now. It is not competent for them to set up his character now. 'Tis hooping the pitcher before it is cracked."

CHAMBERLAIN, J. The tendency of the cross examination is to impeach the witness *O'Brien*, in the particular transaction before the court, and the witness now offered to be produced is to shew, that he gave an account of the proceedings as they happened. It is not competent for them now to produce witnesses to shew that

that the witness already examined is of good character; but they want to prove merely, that his former account is consistent with his present. Such evidence has always been received in my experience. Accordingly lord *Portarlington* was sworn and examined. *Ridgeway's Rep. Finny's trial* 88. compared with *MS. note, by Mac Nally, jun. **

In the case of HENRY and JOHN SHEARS, at a commission of oyer and terminer, Dublin, July 1798, 38 *Geo.* 3. before lord CARLTON, C. J. C. P. CROOKSHANK and DAY, J's, and GEORGE and SMITH, B's. Captain *Clibborn* was admitted to prove, that the evidence given in court by *John Wamford Armstrong*, against the prisoners, was consistent with an account of the same transaction given by him to the witness. *Ridgeway's rep. of Shears's trial*, 95, 96. *Also MS. note.*

Also on the trials of JOHN McCANN, WILLIAM MICHAEL BYRNE, and OLIVER BOND, at the same commission of oyer and terminer, July 1798, before the last mentioned judges: *William Cope* was called, to prove the consistency of *Thomas Reynolds*, an accomplice, and approver, in conversation with him respecting the treasonable plot of which he had given evidence in court. See the several trials reported by *Ridgeway*.

Rule the Sixth.

In exception to the general rule, that, "no evidence" can be received against a prisoner but in his presence;" it has been repeatedly determined, and is unquestionable law, that on a trial for murder, the declarations of the deceased, after the mortal wound is given, conscious of approaching death, may be received in evidence against the prisoner, although such declaration was not made in his presence.

As in the KING, v. REASON and TRANTER, *Hilary*, 8 *Geo.* 1. The prisoners, who were sheriffs officers, stood

* *Finny* was acquitted, and the witness, *James O'Brien*, was afterwards hanged for murder.

stood charged by indictment, for the murder of *Edward Luttermal*, Esq. The counsel for the crown offered in evidence several declarations of the deceased, when on his death bed, whereby he charged the prisoners with having murdered him, and the court admitted the evidence. 1 *Strange* 499. 6 *St. Tr.* 195, 201.

In the same case it appeared, that two justices of the peace administered an oath to the deceased on the day of his death, and that he made another, and more particular declaration to the same effect, which was taken down in writing by a clergyman present; but Mr. *Luttermal* not being able to write, it was not signed by him. The COURT called for this paper that had been written from the mouth of the deceased, saying, that was better evidence than the memory of the witness. The original was not to be had; but the clergyman, who gave evidence, tendered a copy, which he said he had taken for his own satisfaction, before he delivered the original to the coroner, and offered to swear it was a true copy. The counsel for the crown insisted that the first paper being only the writing of the witness, not signed by the deceased, this which he now produced was as much an original as that. But the COURT refused to let it be read, unless it was first shewn that the original was lost; whereas it appeared, that it could have been procured if sent for in time. 6 *St. Tr.* 195, 201.

It was then objected by the chief justice, that since the written evidence was not produced, the whole evidence of the deceased's declarations ought to be rejected; for the first, second, and third, being all to the same effect, are but one fact, of which the best evidence was not produced, and therefore no evidence could be received of the first and third conference with the deceased. But the other judges were of a contrary opinion; saying, they were three distinct facts, and there was no reason to exclude the first and third declarations of the deceased, merely because no account could be given of the second. And, thereupon the witness was directed to repeat his evidence, laying the examination before the justice out of the case, which he did accordingly. *Ibid.*

So

So also in the KING, v. major ONELY, convicted for the murder of *William Gower, Esq; Old-Bailey sessions, March, 1725*, Mr. *Gower's* dying declaration was received in evidence. 9 *St. Tr.* 14, 15.

Rule the Seventh.

Such declaration of a person *mortally wounded*, as is set forth in the sixth rule, may be received in evidence on the trial of the offender, although the party wounded did not express any apprehension of approaching dissolution.

As in the KING, v. WILLIAM WOODCOCK, *Old-Bailey, January sessions, 1789, 29 Geo. 3.* before EYRE, C. B. ASHURST, J. and ADAIR, R. of *London*.

The prisoner was indicted for the murder of *Silvia Woodcock*, his wife, who was found bleeding from several wounds, and apparently dead. She lived eight hours, repeated the circumstances of the ill usage she had received, but never expressed any *apprehension*, or seemed *sensible* of her approaching dissolution. Her deposition had been taken down in writing, by a magistrate, and the question was, whether the evidence which had been obtained from the deceased, could legally be left to the jury as a dying declaration.

EYRE, C. B. said, if I were satisfied that the case was quite full, without the circumstances which the deceased has disclosed, I should willingly omit to state them, as evidence against the prisoner; because, there is some difficulty as to the legality of their admission. Great as a crime of this nature must always appear to be, yet the inquiry into it must proceed upon the rules of evidence. The most common and ordinary species of legal evidence consists in the depositions of witnesses, taken on oath before the jury, in the face of the court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give. But beyond this kind of evidence there are two other species which are admitted by law, and one is the dying declaration of a person who has received a fatal blow, the other depositions taken before a magistrate pursuant to the

the statute of *Phil. & Mary*. Vide, for the other species. *Ante* 297. S. C.

But although we must strip this examination of the sanction to which it would have been intitled, if it had been taken pursuant to the directions of the legislature, yet still it is the declaration of the deceased, signed by herself, and it may be classed with all those confirmatory declarations which she made after she had received the mortal wounds, and before she died. Now the general rule on which this species of evidence is admitted, is, that they are *declarations* made in *extremity*, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silent, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath, administered in a court of justice. But a difficulty arises with respect to these declarations; for it has not appeared, and it seems impossible to find out, whether the deceased herself apprehended that she was in such a state of mortality as would inevitably oblige her soon to answer, before her maker, for the truth or falsehood of her assertions. Upon the whole of this difficulty my judgment is, that in as much as she was *mortally wounded*, and was in a condition which rendered almost immediate death inevitable, as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations, as to what she thought of herself and her situation, her declarations under these circumstances, ought to be considered *by a jury*, as being made under the impression of her approaching dissolution; for resigned as she appeared to be, she must have felt the hand of death, and must have considered herself a dying woman. Declarations so made, are certainly intitled to credit; they ought, therefore, to be received in evidence, but the degree of *credit* to which they are intitled, must always be a matter for the sober *consideration of the jury*, under all the circumstances of the case. His lordship then left it with the *jury* to consider, whether the deceased was not in fact under the apprehension

apprehension of death, though she did not seem to expect immediate dissolution; and said, that if they were of opinion that she was, then her declarations were admissible, but that if they were of a contrary opinion, they were not admissible. The prisoner was convicted and executed. *Woodcock's case, Leach's Cr. Ca. 2 ed. 397. 3 ed. 563. Radburne's case, Leach Cr. Ca. 364. Vide chap. 27. Ante 282.*

So in the KING, v. CALLAGHAN, *Cork assizes, April 1793, 33 Geo. 3.*

The prisoner was indicted for the wilful murder of Hyde. Depositions of the deceased, taken in writing by a magistrate, in the hospital where he lay, but not in the presence of the prisoner, were offered in evidence.

Mac Nally, for the prisoner, objected to their being read, on the authority of *Woodcock's case*, as not having been taken pursuant to the statute (Irish) 10 Car. c. 1.

Downs, J. ordered the magistrate to be sworn, and he having deposed, that the deceased, at the time of giving those depositions, was impressed with the fear of immediate death, his parol testimony of the facts, declared by the deceased, was admitted. *MS.*

The same point occurred in DINGLER's case, *Old-Bailey, September sessions, 1791*; and GOULD, J. decided as in the last case. *Leach's Cr. Ca. 2 ed. 360. 3 ed. 638. Vide, Ante 299. S. C.*

In Mrs. TRANT's case, *Tralee, Kerry, Spring assizes, 1793, 33 Geo. 3.* The most material evidence produced against the prisoner, who was indicted for the murder of her husband, was a declaration made by the deceased to a witness, after he received a mortal stab in the breast with a carving knife. On an objection being made,

Downs, J. said, the declarations of a person who has received a mortal wound, are evidence in almost every case *to go to a jury*: and are to receive credit from the peculiar circumstances of the case. But while the jury turn such declarations in their mind, they are also to take into their contemplation the motive which produced such declarations; and the situation in which the party making such declarations conceives himself to be at the

time of making them, is also a material object for their consideration. *MS.*

So in the KING, *v.* MICHAEL MINTON, at *Mullingar, Westmeath, summer assizes*, 1800, 40 *Geo.* 3.

The prisoner was tried for a rape and murder of a young woman of sixteen. The deceased lived but a few days after the perpetration of the rape, and communicated a shocking detail of circumstances to her aunt, but did not intimate that she considered herself in a dying condition, or that she had any apprehension of immediate death. It appearing, however, that previous to her making this declaration, she had confessed, had been absolved, and received extreme-unction, from a priest, and that these are considered the last rites administered in the catholic church, and are esteemed sacraments by its disciples,

Lord KILWARDEN, C. J. with the concurrence of KELLY, J. admitted evidence of the declarations of the deceased, and left the point of mental impression (as in *Woodcock's*, *Dingler's*, and *Trant's* cases) to the jury: and the jury found the prisoner guilty. *MS.*

In civil cases, the rule of receiving, as evidence, the dying declaration of a person *in extremis*, hath also been adopted; and on the same principle as in criminal cases.

As in WRIGHT, *ex dimissis* WILLIAM CLYMER, *versus* LITTLER, *et al'* in ejectment. On the trial of this cause, *Mary Victor* was permitted to prove, "That while she " was attending her brother *William Medlicot*, in his last " illness, and about three weeks before his death, he " pulled out of his bosom the will of 1743, and said, " it was the true will of *John Clymer*, and then delivered it to her, with directions to deliver it over to " *William Clymer*, the lessor of the plaintiff." And she added, "that one *Edwards* was present at the time."

Edwards confirmed the evidence of *Mary Victor*, " That *Medlicot* did pull the will of 1743 out of his " bosom, and gave it to her with such directions as she " deposed." And on the cross-examination of *Mary Victor*, she added, "that at the same time that *William Medlicot* produced the will of 1743, as the true will " of old *John Clymer*, he acknowledged and declared to " her,

"her, that the will or instrument of 1745, was forged by himself." And no objection was made to this evidence on the trial.

On a motion for a new trial, the admissibility of this evidence was objected to, as being only *hearsay*; that what *Medlicot* said ought not to be admitted or regarded; for it was not said *upon oath*, and there was no opportunity of *cross-examining* him.

To this it was answered, this evidence is *admissible*, because it is the *solemn declaration of a dying man*, to his nearest relation, which is equal to an oath: for such declarations of dying men have been admitted as evidence, even in cases of *murder*. So that it ought not to be called "*mere hearsay evidence*."

Earl MANSFIELD, C. J. on this point observed, the defendants complain, that the chief justice (*Willes*) misdirected the jury, by leaving to them as evidence the declaration of *Medlicot*, "that he forged the will." They made no objection to it on the trial, and it certainly was a circumstance *proper* for the jury to consider. The competence of evidence depends upon the circumstances under which it is given. The declaration of *Medlicot*, in his last illness, when he produced and delivered the will of 1743, for the use of the plaintiff, is allowed to be competent and material evidence. As the account was a *confession* of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience, the evidence was proper to be left to a jury. 3 *Burr.* 1244, 1255.

Rule the Eighth.

The declaration of a convict, at the place of execution, cannot be given in evidence, as the declaration of a dying person.

So ruled in the KING, v. DRUMMOND, *Old-Bailey, Sessions* 1784, 24 *Geo.* 3. before EYKE, C. B. and GOULD, J.

The prisoner was indicted for robbing earl *Clermont*. His counsel informed the court, that one *Edwards*, lately executed for a highway robbery, had communicated something to Mr. *Villeter*, the ordinary of Newgate,

touching the commission of the identical robbery under consideration, and submitted, that as Mr. *Villette's* knowledge upon the subject had proceeded from the solemn declaration of a dying man, it was admissible evidence in favour of the prisoner.

The COURT held, it would be inconsistent with the rules of evidence, which are rules of justice, to examine a witness to the declarations of a person dying under the circumstances described. The principle upon which this species of evidence is received is, that the mind impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God, upon oath; the *declarations* therefore of a person dying under such circumstances, are considered as equivalent to the *evidence* of the living witness upon oath. But to examine a witness to the declarations of an attainted convict, would be carrying the rule of evidence beyond its possible extent, even if the person were alive; for as an attainted convict, he could not have been permitted to give testimony upon oath, and the dying declarations of such a person cannot, consistently with the principles of justice, be considered as better evidence than his testimony upon oath would have been were he alive.

The fact, however, that a man resembling the person of the prisoner was executed, may be given in evidence, provided it is confined within such time as to make it probable that he was the person who committed this robbery. *Leach's Cr. Ca.* 2 ed. 275, 276. 3 ed. 378.

From the reason assigned for rejecting the evidence of a convict in the foregoing case, it appears, that the dying declaration of a person *attainted*, cannot be received, even on an indictment for the murder of such person, for his competency is totally destroyed, unless restored by pardon.

Rule the Ninth.

Every witness, whether on his examination in chief, or on the cross-examination, has a natural right to explain and make clear the evidence he has given; and if
any

any doubt arises after his examination has closed, the court will call upon him for such explanation.

Such explanation is, in many instances, allowed in written evidence, and it is much more reasonable that it should be admitted on examinations *viva voce*. Counsel are apt, on cross-examining a witness, to impeach his credit, on apparently contradictory matter: and lord MANSFIELD has often said, on such occasions, "Would you have the witness perjured, because he will not be perjured, but corrects himself like an honest man?"

The good sense of this rule, and of lord MANSFIELD'S observation, appears in the following case.

The KING, v. HUNY, *Thetford assizes, March 1786*. The indictment, which was for *perjury*, charged the defendant with having "Falsely, corruptly, wilfully, and maliciously deposed, that *John Watson* was indebted to him the said *William Huny*, in the sum of eleven shillings, whereas in truth and in fact, the said *John Watson* was not indebted to him the said *William Huny*, in the aforesaid sum, nor in any other sum of money whatever."

The case stated was, that captain *Shipley*, of the ship *Alexander* and *Margaret*, applied to the court of admiralty, of the borough of *Great-Yarmouth*, to recover anchors and cables, which his ship by stress of weather, was obliged to leave in *Yarmouth-road*, on paying the charge of salvage. *Huny*, as agent to captain *Shipley*, paid the bill, but having made an objection to the charge of cartage, summoned Mr. *Watson* before the court of requests, to answer for an over-charge. Mr. *Watson*, an attorney, was judge of the court of admiralty, and Mr. *Reynolds*, his partner, presided in the court of requests. The clerk of the court administered the oath to Mr. *Huny*, according to the practice, in order to his proving the demand, and then asked him, *is Mr. John Watson, indebted to you Mr. Huny in the sum of eleven shillings?* the sum demanded: he answered *he is*. On the question being repeated, and the witness desired to recollect himself, he subjoined, *as agent to Mr. Shipley*.

Sir GEORGE NARES, J. on the evidence for the prosecution being closed, said, "It would be hard indeed, if
" a man

" a man were not suffered to explain his own meaning; here is evidently an indictment found on part of an oath, when that which is most essential to its meaning is left out." The counsel on the other side would have the cause go on; but the judge said it could not; and that he hoped future prosecutors would take care from such an example, not to prefer indictments on such unjust grounds. And turning to the jury, repeated, that this was perjury assigned on *part* only of an oath, the most material part being purposely kept back. That of course they must find a verdict of *not guilty*: and the jury acquitted the prisoner, warmly expressing their feeling.

After, on an action for a malicious prosecution, a special jury gave 3000*l.* damages. *Gilb. Law of Evid. by Loft, 55.*

Rule the Tenth.

What has been sworn against a defendant on the trial of another person ought not to be given in evidence against him on his own trial. 2 *St. Tr.* 863.

Yet, in the case of sir JOHN FENWICK, impeached by the Commons of England, 8 *Will.* 3. it was moved that evidence should be admitted to prove what a person named *Goodman* had sworn against a person named *Cook*, who had been tried for treason.

Sir T. Powis and Sir Bart. Shower, for the prisoner, urged, what is sworn against one man at one time must be always taken for truth against *all* others. The trial of one of a company is the trial and condemnation of all; contrary to a fundamental rule of law that no evidence shall be given against a man when he is upon the trial of his life, but in his presence: because the offences may be different, and because the prisoner may cross-examine him who gives such evidence; and that is due to every man in common justice. 5 *St. Tr.* 83.

Sir CHRISTOPHER MUSGRAVE, a member, asked of the house, is there any law in being that says a judge may hear a witness as to what was sworn upon the trial of another person, to condemn him who was not party to that

that trial? If there be no such law, then the rule is founded upon justice and common right, that nothing shall be brought against a man, when a man was not party, when the oath was not made, and he had no opportunity to examine the witness. *ib.* 118.

After a very long, ardent, and interesting debate, the motion was carried in the *affirmative* against the established rule and known principles of law, on the ground that though such evidence could *not* be received in the courts of law, yet it was admissible before the Commons on an impeachment, for that they were not bound by the rules of evidence adhered to in Westminster-hall. *ibid.* *Ante ca.* 18. *p.* 282.

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

2. The second part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

3. The third part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

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